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Supreme Court, U.S.
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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

[redacted]

EX PARTE ABRAM C. WISNER

9 Orig'l.

O.T.1906

PETITION FOR WRIT OF MANDAMUS

ORIGINAL PROCEEDING No.

OLIVER & MECARTNEY,
JONES, JONES & HOCKER,
J. J. DARLINGTON,
Counsel for Petitioner

IN THE

Supreme Court of the United States

EX PARTE ABRAM C. WISNER

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Abram C. Wisner, respectfully shows to this Honorable Court:

That on the 17th day of February, A. D. 1906, your petitioner commenced a civil action at law by attachment in the

Circuit Court in and for the City of St. Louis and State of Missouri, against one John D. Beardsley, by filing in said court a petition, together with an affidavit that said Beardsley was not a resident of said State and was a resident of the State of Louisiana (in conformity to the statutes of said State concerning attachments), returnable to the April Term of said court, to recover from said Beardsley on a cause of action set forth in the first count of said petition the sum of eighty-five thousand dollars, for breach of a certain option contract, executed and delivered by said Beardsley to your petitioner for the sale, transfer and delivery by said Beardsley to your petitioner of a majority of the shares of the capital stock of the Louisiana and Northwest Railroad Company, and for the sale to petitioner of another certain contract between said Beardsley and said Railroad Company under which said Beardsley had built the line of railroad owned by said company in the States of Louisiana and Arkansas, by the terms of which said Beardsley was to receive, and there was due and owing to him bonds of said Railroad Company, secured by first mortgage upon its property, aggregating one million seven hundred and twenty-five thousand dollars, together with all rights, benefits and advantages, accrued or to accrue to said Beardsley under said contract, and for all of which your petitioner was to pay said Beardsley the sum of $1,495,000 in the manner specified in said contract, and also to recover on another and different cause of action, in the second count of said petition set forth, fifteen thousand dollars for goods sold and delivered, money paid and laid out and expended by your petitioner for said Beardsley at his instance and request, and money had and received by said Beardsley to the use of your petitioner.

And your petitioner further shows to the Court that upon the filing of said petition and affidavit in said Circuit Court a writ of attachment in the usual form, issued out of said Circuit Court, in due course in said cause on the said 17th day of February, A. D. 1906, dated on said day, directed to the sheriff

of said City of St. Louis, commanding him to attach the said John D. Beardsley by all and singular his lands, tenements, goods, chattels, rights, moneys, credits, evidences of debt or so much thereof as should be sufficient to satisfy the plaintiff's claim, and also that he summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of said defendant might be, or who might be named by the plaintiff in said cause (your petitioner herein) or his attorneys, as garnishees, and that they said garnishees so summoned to appear before said Circuit Court of the City of St. Louis on the first day of its next term to be holden on the first Monday, the second day of April, 1906, and said writ was returnable to the first day of the next term of said court to be held in said city on the first Monday of April, 1906, to-wit, April 2, 1906, which writ was in due course delivered to said sheriff; and that said sheriff, as appears from his return on said writ, dated the 17th day of March, A. D. 1906, made to said April Term of said court, according to the command of said writ, executed said writ, on said 17th day of February, by returning that no goods, chattels or real estate were found by him in said city belonging to the defendant, the said John D. Beardsley, whereon to levy said writ and make the debt and costs, and by thereupon attaching by direction of your petitioner's attorneys, in the hands of the Mississippi Valley Trust Company, a corporation in said City of St. Louis, by a written declaration (as required by the statutes of said State in such cases made and provided) directed to the said corporation, and delivered said declaration to Breckenridge Jones, Vice-President of said corporation (he being in the office of said corporation and having charge thereof), all debts due from it to said defendant in said action, John D. Beardsley, and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt of or belonging to the said defendant in said action, the said John D. Beardsley, or so much thereof as would be sufficient to satisfy the

debt, interest and costs of said action, and by summoning it in writing as garnishee by a written summons of garnishment, directed to said corporation and delivering the said amount of garnishment to said Breckenridge Jones, Vice-President thereof, requiring it to appear before said Circuit Court at the return term of said writ, to-wit, on the first Monday in April next, to-wit, April, A. D. 1906, to answer such interrogatories as might be exhibited and propounded to it by the plaintiff named in said summons; and your petitioner further shows that said writ also directed the sheriff of said city to summon the said John D. Beardsley to be and appear at the then next term of said Circuit Court and before the Judges thereof, on the first day of the then next term of said court to be holden in the City of St. Louis on the first Monday of April, 1906, to-wit, on the second day of April, 1906; and as appears from a further return made by said sheriff of said writ to said court as aforesaid, said sheriff also executed said writ on the 17th day of March, A. D. 1906, by delivering in said City of St. Louis, a copy of the writ and petition as furnished by the clerk of said court to John D. Beardsley, the defendant therein, thereby summoning the said defendant to be and appear before said court on the day named in said writ, which said summons was executed in the manner and form provided by the statutes of said State for the personal service of process in civil actions.

And your petitioner further shows to the Court that on the 17th day of March, A. D. 1906, and before the commencement of the April Term of said Circuit Court (that is before the first Monday in April, A. D. 1906), to which said writ of attachment and said summons of garnishment was returnable, and before the filing of the petition and bond for the removal of said action from said Circuit Court of the City St. Louis hereinafter set forth and described, and before and without the filing by your petitioner of the interrogatories which the laws of said State require to be filed by the plaintiff in cases of

garnishment and before the time limited in said laws for the filing of interrogatories had run or expired, and before the return day of said cause, to-wit, on the said 17th day of March, 1906, The Mississippi Valley Trust Company, garnishee in said action as aforesaid, filed in said Circuit Court of the City of St. Louis, answers to certain purported interrogatories, in which answer to said purported interrogatories it stated among other things, as follows:

(Answer of Garnishee.)

"Further answering said interrogatories, said garnishee states that it has in its possession property belonging to said John D. Beardsley, or in which he may be interested, consisting of the amounts of bonds of the Louisiana and North West Railroad Company hereinafter described.

"Said garnishee further states that it is a corporation organized under the laws of Missouri, and among other powers, is authorized to act as trustee under corporate mortgages; that it is trustee under a mortgage deed of trust of the Louisiana & North West Railroad Company, a corporation organized under the laws of the State of Louisiana, dated the first day of April, 1905, securing an authorized issue of bonds of said Railroad Company to the amount of $10,000,000 of even date with said mortgage, bearing interest at 5% per annum, payable semi-annually as evidenced by interest coupons thereto attached, which bonds are payable on the first day of April, 1935; that said mortgage provides none of said bonds shall be valid until authenticated by this garnishee as trustee and said mortgage fully sets out the terms and conditions upon which the bonds are to be authenticated; that said garnishee files herewith printed copy of said mortgage as Exhibit 'A' to this, its answer; that under article 2, section 1 of said mortgage, it is provided, among other things, that said garnishee, as trustee shall authenticate bonds to the amount of $1,725,000, face value, and deliver to the Railroad Company, or on its order, on filing with the trustee a copy of a resolution of the board of directors

of said railroad company, certified under the corporate seal thereof by a proper officer, requesting such delivery; that pursuant to the provisions of said mortgage, on or about the 12th day of February, 1906, there was filed with said trustees a certified copy of minutes of meeting of the board of directors of said railroad company held January 15, 1906, at which meeting said directors adopted resolutions directing the delivery of $1,725,000 face value of bonds, and under the terms of said mortgage it became the duty of said trustee to authenticate and deliver such bonds upon receipt of said certified copy of said minutes; that all of said bonds were authenticated as provided in said mortgage on the 16th day of February, 1906; that among the resolutions adopted by said board was a resolution as follows: 'The trustee in the first mortgage is further requested to deliver to J. D. Beardsley or order first mortgage gold bonds of the face value of $230,000, and to Geo. W. Hunter and J. D. Beardsley, or upon their joint order, first mortgage gold bonds of the face value of $320,000'; that none of said $230,000 or of said $320,000 of bonds have been delivered by said garnishee as trustee aforesaid, and at the time when garnishment process was served as aforesaid, said bonds duly authenticated were, and since that time have been, and at the present time are, in the hands of this garnishee as trustee under the conditions aforesaid. What are the rights of said Beardsley to said $230,000 face value of bonds or said $320,000 face value of bonds, this garnishee has no information beyond what is herein stated."

And your petitioner further shows the Court that afterwards at the February Term of said Circuit Court and on the 17th day of March, A. D. 1906, and before the day of the commencement of said April Term aforesaid, and before it was required by the laws of the State of Missouri, or the rule of said State court in which said action was brought, to answer or plead to the said petition filed therein as aforesaid, the said John D. Beardsley, the defendant in said action, by his attorneys, Stewart, Eliot & Williams and Moore, Smith & Moore,

made and filed in said action in said Circuit Court in and for the City of St. Louis and State of Missouri, for the removal of said action from said court last aforesaid into the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, the Circuit Court of the United States to be held in the district where such action was pending, the petition and bond required for removal of causes by the third section of the Act of Congress of August 13, 1888, amendatory of the Acts of March 3, 1887, and March 3, 1875, which said petition was and is in the words and figures following:

(Petition for Removal.)

In the Circuit Court of the City of St. Louis, Missouri, April Term, 1906.

"Abram C. Wisner, Plaintiff,
vs.
John D. Beardsley, Defendant.

To the Honorable ....., *Judge of the Circuit Court of St. Louis.*

"Your petitioner respectfully shows that he is the defendant in the above entitled suit, and that he is a non-resident of the State in which the said suit was brought, to-wit, Missouri, and the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of $2,000;

"That the said suit is of a civil nature, being a suit, upon the first count, brought by the plaintiff for the breach of a contract or option given him by the defendant for the sale, transfer and delivery to plaintiff of a majority of the shares of the capital stock of the Louisiana and North West Railroad Co., together with the right, interest and title of the defendant in a certain contract between said defendant and the Louisiana & North West Railroad Co. for the issuance and delivery to the defendant of the first mortgage bonds of said Railroad Company of the aggregate face value of $1,725,-

000; that for the alleged breach of said contract plaintiff claims he was put to great expense and trouble, and expended a great deal of time, and suffered a loss of profits which he would have realized if the said contract had been performed and executed, to his damage in the sum of $85,000;

"And on the second count, for a balance of $15,000 that plaintiff alleges defendant is owing him for goods sold and delivered by plaintiff to defendant at his request and for moneys paid, laid out and expended by plaintiff for defendant, at his request, and for money lent by plaintiff to the defendant, at his request, and for moneys had and received by defendant to and for the use of the defendant.

"That the controversy in the said suit is only between citizens of different States, to-wit, your petitioner, who avers he was at the time of bringing this suit, and still is, a citizen of the State of Louisiana, and the said plaintiff who, as your petitioner avers, was then and still is, a citizen of the State of Michigan;

"And your petitioner herewith offers a bond with good and sufficient surety for his entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, on the first day of its next session, a copy of the record in this suit, and for paying the costs that may be awarded by the said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto;

"And your petitioner prays this Honorable Court to proceed no further herein except to make an order for the removal of this case to the said Circuit Court and to accept the said surety and bond and cause the record herein to be removed into said Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri and he will ever pray, etc.

STEWART, ELIOT & WILLIAMS,
MOORE, SMITH & MOORE,
Attorneys for Defendant."

"State of Missouri, }
City of St. Louis. } ss.

I, J. D. Beardsley, being duly sworn do say that I have read the foregoing petition and know contents

thereof, and that the statements and allegations therein contained are true as I verily believe.

J. D. BEARDSLEY.

Subscribed and sworn to before me this the 17 day of March, 1906.

JOHN MCCLUSKEY BLANEY, JR.,
Notary Public."

My commission expires the 13th day of Oct., 1909.

And upon said day last aforesaid at the February Term of said Court, the said petition for removal and bond required by said act, was presented to said Court, and said Court made and entered of record an order, in words and figures as follows:

(Order of Removal.)

Saturday, March 17, 1906.

On this day there is filed herein and presented to the Court the petition of the defendant removal to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, accompanied by bond in the sum of five hundred dollars ($500.00) in the form required by law with J. H. Allen and J. H. Stegall as sureties, which bond is hereby duly approved and it appearing that the defendant is entitled under the statutes of the United States to remove this case into the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, it is therefore ordered that this case be, and the same is hereby removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and it is further ordered that no further proceedings be taken in the cause in this court except the making of a transcript.

WALTER B. DOUGLAS,
Judge.

That afterwards and on the 19th day of March, 1906, being the first day of the then next succeeding term of the United States Court for the Eastern Division of the Eastern Judicial District of Missouri, within which division the City

of St. Louis is located, a duly certified transcript of the record of the proceedings of said Circuit Court of the City of St. Louis in said action was filed by said John D. Beardsley, defendant therein, in said Circuit Court of the United States for said Eastern Division of the Eastern Judicial District of Missouri, who thereupon entered his appearance therein, and said action was fully removed to said court last aforesaid.

And your petitioner further shows unto the Court that upon the removal as aforesaid of said action from said Circuit Court in and for the said City of St. Louis and State of Missouri to said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and before your petitioner had in any way appeared in said suit, or had done or been a party to any act, doing or proceeding in said suit, or had in any way acknowledged that said suit had been properly removed from said State Court to said Circuit Court of the United States, by appearance in, or by in any way prosecuting his said cause in said court, or doing anything whatsoever in said cause or connected with, or incident to the prosecution thereof, or had by any act or proceeding in said court acknowledged that said suit had been properly removed, or that said Circuit Court of the United States had jurisdiction by virtue of said removal, or otherwise, to retain said suit, or to take jurisdiction of said cause so removed as aforesaid, or to hold any plea therein, or take any step in the said cause, your petitioner appearing specially and solely for the purposes of the motion next hereinafter mentioned, and expressly denying that said court had jurisdiction of said cause, as appears on the face of said motion, did, on the 29th day of March, A. D. 1906, file in said Circuit Court of the United States, in said cause, a motion to remand said cause so removed as aforesaid to the Circuit Court of the City of St. Louis from whence it was removed, which said motion was and is in the words and figures following:

(Motion to Remand.)

In the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

"Abram C. Wisner, Plaintiff,
vs.
John B. Beardsley, Defendant.

"Now at this day comes plaintiff, by his attorneys, Jones, Jones & Hocker, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the Court to remand this cause to the Circuit Court of the City of St. Louis, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and the cause is not one within the original jurisdiction of this court, hence this court cannot acquire jurisdiction by removal.

JONES, JONES & HOCKER,
Attorneys for Plaintiff."

And your petitioner further shows to the Court that afterwards such proceedings were had in said Circuit Court of the United States, upon and in respect to said motion to remand, that said motion was duly heard by said court, and by the Honorable Gustave A. Finklenberg, Judge of the District Court of the United States, for said district, at the time holding the said Circuit Court of the United States, in pursuance to the statutes of the United States in such cases made and provided, and the motion having been duly considered by said court, said court did on the 2nd day of April, A. D. 1906, ren-

der its decision and judgment upon and in respect of said motion and did overrule said motion to remand said cause aforesaid, and did announce and file in said court a memorandum opinion or decision overruling said motion to remand, which is in words and figures as follows:

(Opinion on Motion to Remand.)

"A. C. Wisner, Plaintiff,
vs.
J. D. Beardsley, Defendant. } Memo. of Decision on Motion to Remand.

"FINKLENBERG, District Judge:

"In this matter I have examined the briefs submitted to me and the authorities therein cited so far as time would permit, particularly the cases of Foulk v. Gray, 120 Federal 156, and Rome Petroleum Company v. Hughes, 130 Federal, 585. I mention these two cases specially as representing the two views which may be taken of this question. In the absence of any controlling decision on this question and in view of the conflict of authorities, I can only follow what appears to my mind to be the more reasonable construction of the removal law, viz.: that under the circumstances prevailing in this case, it was removable, and that the motion to remand should be overruled.

"The question involved is a close one and I bear in mind that if the case is remanded there can be no appeal or review, of any kind, while if jurisdiction is retained, the decision of this Court, if erroneous, can be corrected.

"Since dictating the above my attention has been called to the case of Cochran v. Montgomery County, 199 U. S. 260. After due consideration of that case I do not think it settles the question here involved and I adhere to the above decision.

"The motion to remand will therefore be overruled."

And thereupon said Circuit Court of the United States for the district aforesaid made and entered an order of record that said motion to remand be, and the same was, overruled and denied.

And your petitioner further shows the Court that on the 27th day of March, A. D. 1906, the attorneys of said John D. Beardsley, defendant in said suit, served upon petitioner's attorneys a notice addressed to your petitioner, and to Jones, Jones & Hocker, his attorneys, that on the 30th day of March, 1906, and at 10 o'clock a. m., of that day, or as soon thereafter as counsel might be heard, they would present to said Circuit Court of the United States to which said cause was removed as aforesaid, a petition, of which a true copy was attached to said notice, at which time and place your petitioner or his attorneys might appear if they saw fit, and which said petition was filed in said cause on March 28, 1906, and prayed that the Mississippi Valley Trust Company, as garnishee in said cause, might be directed and ordered to turn over to the marshal of said court, such amount of the bonds garnished in its hands in said cause as aforesaid, as might be considered by the said Court sufficient to satisfy the claim of plaintiff in said cause and that upon compliance with the order of the Court to that effect said garnishee stand discharged, and that on said 30th day March, 1906, said petition was presented to said Court and your petitioner informed the said Court that he refused to appear in said cause for the disposition of said petition, or for any purpose whatsoever, and that he intended to apply to this Honorable Court for a writ of prohibition against the said Circuit Court of the United States retaining said cause on said removal aforesaid and assuming jurisdiction of said cause by virtue of said removal, or holding plea in said cause, or taking any steps or proceedings in said cause whatsoever except to remand said cause, and that thereupon said Court declared from the bench that it would withhold action on said petition last aforesaid in order that your petitioner might have an opportunity to make this application to this Court. And your petitioner further shows this Court that he has not since appeared in said cause or done any act or thing therein in any way acknowledging the jurisdiction of said Court

over said cause or over himself, or waiving his right to object to the jurisdiction thereof over said cause or himself, or acknowledging the right of said court to retain said cause in said court by virtue of said removal.

And your petitioner further shows to the Court that the second section of the Act of Congress, approved August 13, 1888, amendatory of the Act of Congress approved March 3rd, 1887, which amended the act approved March 3, 1875, after providing, in the first clause thereof, that causes of a civil nature, in law or in equity, arising under the Constitution, or laws, or treaties, of the United States (of which the Circuit Courts of the United States are by said clause given original jurisdiction by the preceding section), may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district, then provides in the second clause thereof as follows: **"Any other suit** of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction **by the preceding section"** (that is, by said section 1 of said act), "and which are now pending, or which may hereafter be brought, in any State Court, **may be removed** into the Circuit Court of the United States for the proper district by **the defendant or defendants therein, being non-residents of that State".**

And your petitioner further shows to the Court that the preceding section (being section one, of said act) referred to in said second section of said act, provides, in the first clause thereof, as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, **or in which there shall be**

a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", and the said clause of said first section goes on and gives jurisdiction of other classes of suits, but your petitioner further shows the Court that by the next clause of the preceding, or first section, of said act, it is provided, among other things, as follows:

> "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court and **NO civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant."**

And your petitioner suggests to this Honorable Court that omitting the classes of suits of a civil nature removable under the first clause of the second section of said act, from the first clause of section one, all other classes of suits of a civil nature, specified in said first or preceding section of said act, remaining after such omission, fall within the terms "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section", and are removable under said section, except as hereinafter suggested, and that among the other classes of suits remaining after such omission, are those **"in which there shall be a controversy between citizens of different States** in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", that is, of two thousand dollars.

And your petitioner further suggests to the Court that said suit brought by your petitioner in the said Circuit Court

for the City of St. Louis and State of Missouri and removed therefrom to the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, as aforesaid (as appears from the face of the verified petition for removal of said cause from said Circuit Court of the City of St. Louis to said Circuit Court of the United States, and upon which said cause was removed as aforesaid from said Circuit Court for said City of St. Louis to said Circuit Court of the United States), is a suit in which there is a controversy between John D. Beardsley, the defendant therein, who was at the time of the bringing of said suit, and still is, a citizen of the State of Louisiana and who is and was a non-resident of the State of Missouri, and your petitioner, the plaintiff therein, who was at the time of the bringing of said suit and still is, a citizen of the State of Michigan and a non-resident of the State of Missouri, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, to-wit, in the aggregate sum or value of one hundred thousand dollars, and is therefore a suit in which there is a controversy between citizens of different States, involving the jurisdictional amount, and therefore removable under the said second clause of the said second section of said act, unless it is taken out of the operation of said second clause of said second section of said act by the effect of the second clause of the preceding (or first, or jurisdictional) section of said act.

And your petitioner further suggests to this Court that it nowhere appears in the said petition for removal above set out, and on which said cause was removed as aforesaid, or from any proceeding in said suit, that either the said John D. Beardsley, the said defendant in said suit removed as aforesaid, or your petitioner, the plaintiff in said suit, is either a citizen of the State of Missouri, or an inhabitant or resident of said Eastern District of Missouri, or of the Eastern Division thereof, in which said Circuit Court of the United States (to

which said suit was removed as aforesaid) is held, and over and within which said court exercises the jurisdiction conferred by said act; and your petitioner suggests that all that appears from the face of said petition for removal, upon which said cause was removed as aforesaid, and from the proceedings in said suit, is that said John D. Beardsley, the defendant in said suit, is a citizen of Louisiana and a non-resident of the State of Missouri, and that your petitioner, the plaintiff in said suit, is a citizen of Michigan as hereinbefore suggested, but your petitioner suggests that said showing is insufficient for the reasons now about to be assigned.

Your petitioner further suggests to this Honorable Court that the second clause of the preceding or first section of said act, hereinbefore quoted, restrains the jurisdiction conferred by the first clause of said preceding or first section of said act; that the last part of said second clause of said preceding, or first, section of said act, which provides, "but when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant" is by way of proviso to the preceding part of said second clause of said preceding or first section, which provides that **"no civil action shall be brought** before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant"; and further suggests that the words "district of residence of" in view of the previous legislation on the subject is equivalent to "district whereof he is an inhabitant", and that the effect is that where the jurisdiction is founded or attempted to be founded upon any of the causes mentioned in section one of said act, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant, but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit must be brought in the district in which either the plaintiff, or

in the district in which the defendant, resides, and cannot be construed as giving jurisdiction **by reason of citizenship,** to a Circuit Court held in a State **of which neither party is a citizen,** but on the contrary, restricts the jurisdiction **to the district in which one of the parties resides within the State of which he is a citizen,** and that it confers no jurisdiction upon the Circuit Court of the United States of any suit brought before such courts in a State of which neither party to said suit is a citizen and in a district of which neither party to such suit is an inhabitant and resident.

And your petitioner further suggests that his said suit so brought and removed as aforesaid, is a suit, as will appear from what has already been suggested and shown to this Honorable Court in which it does not appear from said petition for removal or anything filed or any proceedings had in this cause, that either of the parties thereto is a citizen of the State of Missouri or an inhabitant or resident of the Eastern Judicial District of Missouri, or of the Eastern Division thereof, and that the jurisdiction upon which said removal was had, and upon which said Circuit Court of the United States has refused to remand said cause, brought before it by said removal and upon which it has decided to retain same in said court and to take cognizance thereof and to hold plea therein, was and is solely founded upon the fact that the parties to said suit were, at the times it was brought and removed as aforesaid, and still are, citizens of different States, without it appearing in any wise in said cause from said petition for removal or on the record or from the proceedings therein, that either said John D. Beardsley, the defendant in said suit, or your petitioner, was at the time said suit was filed as aforesaid, or when it was removed as aforesaid, or since, or is now, a citizen of Missouri, or that either said defendant Beardsley, or your petitioner, was, when said suit was filed as aforesaid, or when it was removed as aforesaid, an inhabitant or a resident of said Eastern District of Missouri, or said Eastern

Division of said District, in which the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to which said suit of your petitioner was removed as aforesaid, is held, and jurisdiction is not given by said section one of said Act to the Circuit Courts of the United States of suits in which the jurisdiction is founded solely on the fact that there is a controversy between citizens of different States where it does not further appear that either the plaintiff or the defendant is a citizen of the State within which the suit is brought and an inhabitant and resident of the district to which it is removed.

And your petitioner further suggests to this Honorable Court that the removal of said cause under the second clause of the second section of said act, under which it must be removed as above suggested, depends on it being a suit of which said Circuit Court for the Eastern Judicial District of Missouri, as one of the Circuit Courts of the United States, is given jurisdiction by the first section of said act itself, and said Court not being given jurisdiction of such suits as that of plaintiff, for the reasons aforesaid, said suit of plaintiff does not come within the second clause of said second section of said act, and cannot be, and was not, lawfully removed under said section, but, on the contrary, the same was unlawfully and improperly removed as aforesaid, and neither said removal, nor said act, confers upon said Court any lawful authority or power to retain said cause in said Circuit Court, or for said Circuit Court to assume jurisdiction of said cause so removed into the same, or to hold plea in the same, or to do anything whatsoever in said cause, except to remand the same to said Circuit Court for the City of St. Louis, in which it was brought and from which it was removed, which it has refused to do as aforesaid.

And your petitioner further suggests to this Honorable Court that said suit so commenced by him as aforesaid, was, until its said removal as aforesaid, wholly before and within

the jurisdiction of said State court in which it was commenced as aforesaid, a jurisdiction wholly independent of, and different from, that of said Circuit Court of the United States to which said suit was removed as aforesaid, and derived and proceeding from another and altogether different sovereign, and was until said removal wholly from before, and wholly without, the jurisdiction of said Circuit Court of the United States to which it was removed as aforesaid, and that the sole, only and first **proceeding** by which said suit was brought before said Court as aforesaid, and at all within its cognizance, was the means by which said removal was effected as aforesaid, pursuant to said act of Congress, and for that reason **said proceeding** for removal was, and is, an **original proceeding** to bring said suit before the said Circuit Court of the United States and within its cognizance, within the meaning of the second clause of the first section of said Act of Congress; that the last part of the second clause of the first section of said act prohibits the bringing of any suit whatever "by any original process or proceeding" where the jurisdiction is founded only on the fact that the action is between citizens of different States, except only in the district of the residence of either the plaintiff or the defendant; that your petitioner's suit is one where the jurisdiction is attempted to be founded only on the fact that the action is between citizens of different States, and said petition for the removal of your petitioner's suit, made as aforesaid, does not show on its face, or in any way whatever, that either said John D. Beardsley, the defendant in said suit, or your petitioner, is either a citizen of the State of Missouri, or a resident or inhabitant of said Eastern District of Missouri, or of the Eastern Division thereof, the State, district and division of said district in which said Circuit Court of the United States before which said suit of your petitioner was brought by said original proceeding of removal, is held, and that by reason thereof said removal as aforesaid is within the said prohibition of said statute and is improper,

unlawful and in violation of the said act and laws of the United States in such cases made and provided, and said Circuit Court acquired, and could acquire, no jurisdiction whatever of, or over, said cause or your petitioner by virtue of said suit being brought before it by ruch removal as aforesaid.

And your petitioner further suggests to this Honorable Court that if said suit had been brought by original process in said United States Circuit Court, to which it was removed as aforesaid, the citizenship being the same, so that the complaint (or bill) did not, and could not, show that either the plaintiff or the defendant therein was a citizen of the State or an inhabitant or resident of the district or division of the district in which said court was held, then upon proper objection made by the defendant (to-wit, that being defendant, he was not subject to the jurisdiction of said court on account of said prohibition of said act, unless he voluntarily submit himself to its jurisdiction), the Court would refuse to entertain jurisdiction of said cause and dismiss the cause, and if he voluntarily submitted himself to the jurisdiction of said court instead of objecting to its jurisdiction, then both the plaintiff (by bringing said suit in said court), and the defendant (by voluntarily appearing in said cause), would have submitted themselves voluntarily to the jurisdiction of said court and the court would therefore have jurisdiction to proceed with the cause.

And your petitioner further suggests to this Honorable Court that when the cause is brought in the first instance in a State court, that said act forbids the same being brought by the original proceeding of removal, before said Circuit Court of the United States, when it does not appear from the petition of removal that either the said plaintiff or the said defendant therein is a citizen of the State, or an inhabitant or resident of the district or division of the district, in which the said Circuit Court of the United States to which it is so removed, is held, and the said act by further providing that the party removing shall give bond to pay costs, if said Circuit

Court shall hold that said suit was wrongfully or improperly removed, and by providing that whenever said Court shall decide that said cause was improperly removed it shall remand the same to the State court from whence it came, and because of the prohibition in said second clause of said first section of said act against the bringing of said suit except as therein provided before said Circuit Court of the United States, clearly gives the plaintiff in case of removal the right to object to the jurisdiction of said Circuit Court to which the said suit was removed both on account of a wrongful, and also of the improper removal of said suit; so that to give jurisdiction in case of such a wrongful or improper removal not only must the defendant submit himself to the jurisdiction of the Court to which he removes said suit, and thus waive his privilege to the prohibition of the act aforesaid, but the plaintiff must submit himself to said Court to which the removal is made (either expressly, or by failing to avail himself of the prohibition of the act aforesaid by objecting in said Court, to said removal as wrongful and improper and moving the Court to remand the case); hence your petitioner suggests that in the bringing of this suit before the Court by the **original proceeding of removal,** as in case of bringing suit before the Court by **original process,** not only the party bringing the suit before the Court by removal (that is, **the defendant), must acquiesce** in the jurisdiction of the Court to which removal is made over the said prohibition of said act, but **the plaintiff also must acquiesce therein,** and your petitioner further suggests that he has not, as shown by the record in said cause in said Circuit Court of the United States to which said cause was removed, acquiesced, in any way, in the assumption of jurisdiction of said case by said Circuit Court of the United States to which said cause was removed as aforesaid, but, on the contrary, he has at all times objected to said Court retaining said cause, or assuming jurisdiction thereof, by virtue of said removal, or otherwise, or of holding plea therein, or to its doing anything

whatsoever in or about the same, except remand said cause to said State Court from which it came, as in such cases provided in said act.

And your petitioner further suggests to this Honorable Court that there is and has been for a long time past a great conflict of decision among the courts of the United States, over which this Honorable Court has supervisory jurisdiction, in respect to the question of removal to, and of the jurisdiction of, the Circuit Courts of the United States, which is now brought before this Honorable Court by this application; that in some jurisdictions said courts hold such removals proper and lawful and that they have and acquire jurisdiction of causes so removed, notwithstanding the objection of the other party on the grounds aforesaid, and they retain causes so removed, and assume and exercise jurisdiction over the same by virtue thereof, while in other jurisdictions said courts hold such removals to be wrongful and improper and deny their jurisdiction by virtue of any such removals and remand the causes so removed to the State courts from which they came; that such contrariety of opinion and decision is clearly pointed out in the opinion of the Court herein before quoted, denying petitioner's motion to remand; and it is for this reason (beside the wrong about to be done by the said Court of exercising jurisdiction in excess of that conferred by the laws of the United Stafes, and in violation of said laws, and to the wrong and injury of your petitioner), the duty of your petitioner to bring said matters involved in this application to the attention and before this Court, that this Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further suggests to this Honorable Court that the decisions of the courts of the United States over which this Honorable Court has supervisory jurisdiction and control, upon and in reference to such removals as are brought before this Court by this application, and the juris-

diction of said Circuit Courts of the United States by virtue of such removals over the causes so removed, and over the plaintiffs therein objecting to the jurisdiction, and the right of said Circuit Court to retain such removals against the timely objection of plaintiffs therein, are, as your petitioner is advised, in conflict with the decisions and utterances of this Court, so far as they have gone, in construing the first and second sections of said act of Congress, and the prior similar acts, and that for this reason it is the duty, and it is right and proper, and your petitioner ought, to bring said matters involved in this application to the attention, and before this Court, in order that the Honorable Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further shows unto this Honorable Court that all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, and which are recited and alleged as facts of which your petitioner is advised, appear from the record of said suit so brought by your petitioner and the proceedings in said State court and in said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri to which said suit was removed as aforesaid, a copy of which record containing the proceedings in said State court as filed in said Circuit Court of the United States upon the removal of said cause thereto, and the record of the action and proceedings of said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, since the removal of said cause to it as aforesaid, is filed with this application.

And your petitioner further suggests to this Honorable Court that notwithstanding the premises, the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, by the overruling of said motion of your petitioner to remand said suit to said State

court from which it was removed as aforesaid, has decided and determined to retain said cause in court and to assume and to exercise jurisdiction over the same by reason of it having been brought before by said court by removal as aforesaid and to hold plea therein, and that said Court will retain the same by reason of its said decision and determination on said motion to remand, and is about to, and will, assume and exercise jurisdiction over the said suit so removed, and hold plea therein, and will assert and attempt to exercise jurisdiction over said suit so removed, and hold plea therein, all in excess of the jurisdiction conferred upon it by the said act and the laws of the United States, and in contempt of said act and the laws of the United States, and will compel your petitioner either to abandon his said suit, or to submit himself to the jurisdiction of said court in said suit, by virtue of said removal and the retention thereof in said court and the wrongful and unlawful assertion and exercise by said court of jurisdiction as aforesaid, and your petitioner is advised that the question involved in this application is whether the said Circuit Court of the United States has jurisdiction at all of said suit so removed as aforesaid under said petition of removal, and to retain the same in said court where your petitioner has not waived his right to object to such wrongful and unlawful assertion and exercise of jurisdiction as said court has and is about and will exercise by reason of its retaining said cause in said court and refusing to remand it as improperly and wrongfully removed and not within its jurisdiction; and your petitioner is further advised that if he shall appear in said suit in said court or do any act or thing to recognize the right of said court to take cognizance of said suit in said court and hold plea therein, he will thereby forfeit and waive his right thereafter to object that said removal of said suit so had as aforesaid was and is

wrongful and improper and be precluded from afterwards asserting that exercise of jurisdiction which said Circuit Court has, and is about to, and will assert and exercise over said suit, was and is wrongful and unlawful and improper and in excess of its jurisdiction given by said act and the laws of the United States, and that your petitioner has and will have no adequate remedy, or any remedy, against such unlawful and wrongful exercise of jurisdiction which said court has, is about and will exercise as aforesaid in retaining said suit in said court and taking cognizance thereof and holding plea therein as aforesaid for that petitioner is without the right of effective appeal, notwithstanding the power of this court to review cases involving jurisdiction by removal, for that petitioner cannot appear in said cause, and invoke the processes of the court (as he must do continually being plaintiff therein), and afterwards object to the jurisdiction thus from time to time invoked by him.

Wherefore your petitioner, the said Abram C. Wisner, the aid of this Honorable Court most respectfully requesting, prays that a writ of mandamus may issue to the said Gustave A. Finklenburg, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, holding the Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, directing and commanding him, to remand the said suit of Abram C. Wisner, plaintiff, v. John D. Beardsley, defendant, to the Circuit Court of the City of St. Louis and State of Missouri, from whence said suit was removed, or, on failure so to do, that he show cause to this Court, on a day to be named in said writ why said cause should not be so remanded.

James C. Jones

Of counsel for Petitioner.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

James C. Jones

Of counsel for Petitioner.

State of Missouri, } ss.
City of St. Louis, }

James C. Jones, being duly sworn on his oath, states that he is agent and attorney of the petitioner, Abram C. Wisner, that he was counsel for the petitioner in charge as his attorney of the case of Abram C. Wisner v. John D. Beardsley, referred to in the foregoing petition, both in the Circuit Court of the City of St. Louis, State of Missouri, and in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri; that he has personal knowledge of the matters and things stated in the foregoing petition; that the matters and things stated in the foregoing petition are true, except insofar as they are stated on advice or information and as to these affiant verily believes them to be true.

James C Jones

Subscribed and sworn to before me this 14 day of April, 1906.

My term expires July 31, 1907

Myron M Medske

Notary Public in and for the City of St. Louis, State of Missouri.

FILE COPY.

Supreme Court U. S.
FILED
APR 23 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

~~No. 24 Orig.~~ 1

EX PARTE ABRAM C. WISNER

10 Orig'l.

O.T.1906

PETITION FOR WRIT OF PROHIBITION

ORIGINAL PROCEEDING No.

OLIVER & MECARTNEY,
JONES, JONES & HOCKER,
J. J. DARLINGTON,
Counsel for Petitioner

IN THE

Supreme Court of the United States

EX PARTE ABRAM C. WISNER

PETITION FOR WRIT OF PROHIBITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Abram C. Wisner, and gives this Honorable Court to understand and be informed:

That on the 17th day of February, A. D. 1906, your petitioner commenced a civil action at law by attachment in the

Circuit Court in and for the City of St. Louis and State of Missouri, against one John D. Beardsley, by filing in said court a petition, together with an affidavit that said Beardsley was not a resident of said State and was a resident of the State of Louisiana (in conformity to the statutes of said State concerning attachments), returnable to the April Term of said court, to recover from said Beardsley on a cause of action set forth in the first count of said petition the sum of eighty-five thousand dollars, for breach of a certain option contract, executed and delivered by said Beardsley to your petitioner for the sale, transfer and delivery by said Beardsley to your petitioner of a majority of the shares of the capital stock of the Louisiana and Northwest Railroad Company, and for the sale to petitioner of another certain contract between said Beardsley and said Railroad Company under which said Beardsley had built the line of railroad owned by said company in the States of Louisiana and Arkansas, by the terms of which said Beardsley was to receive, and there was due and owing to him bonds of said Railroad Company, secured by first mortgage upon its property, aggregating one million seven hundred and twenty-five thousand dollars, together with all rights, benefits and advantages, accrued or to accrue to said Beardsley under said contract, and for all of which your petitioner was to pay said Beardsley the sum of $1,495,000 in the manner specified in said contract, and also to recover on another and different cause of action, in the second count of said petition set forth, fifteen thousand dollars for goods sold and delivered, money paid and laid out and expended by your petitioner for said Beardsley at his instance and request, and money had and received by said Beardsley to the use of your petitioner.

And your petitioner further shows to the Court that upon the filing of said petition and affidavit in said Circuit Court a writ of attachment in the usual form, issued out of said Circuit Court, in due course in said cause on the said 17th day of February, A. D. 1906, dated on said day, directed to the sheriff

of said City of St. Louis, commanding him to attach the said John D. Beardsley by all and singular his lands, tenements, goods, chattels, rights, moneys, credits, evidences of debt or so much thereof as should be sufficient to satisfy the plaintiff's claim, and also that he summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of said defendant might be, or who might be named by the plaintiff in said cause (your petitioner herein) or his attorneys, as garnishees, and that they said garnishees so summoned to appear before said Circuit Court of the City of St. Louis on the first day of its next term to be holden on the first Monday, the second day of April, 1906, and said writ was returnable to the first day of the next term of said court to be held in said city on the first Monday of April, 1906, to-wit, April 2, 1906, which writ was in due course delivered to said sheriff; and that said sheriff, as appears from his return on said writ, dated the 17th day of March, A. D. 1906, made to said April Term of said court, according to the command of said writ, executed said writ, on said 17th day of February, by returning that no goods, chattels or real estate were found by him in said city belonging to the defendant, the said John D. Beardsley, whereon to levy said writ and make the debt and costs, and by thereupon attaching by direction of your petitioner's attorneys, in the hands of the Mississippi Valley Trust Company, a corporation in said City of St. Louis, by a written declaration (as required by the statutes of said State in such cases made and provided) directed to the said corporation, and delivered said declaration to Breckenridge Jones, Vice-President of said corporation (he being in the office of said corporation and having charge thereof), all debts due from it to said defendant in said action, John D. Beardsley, and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt of or belonging to the said defendant in said action, the said John D. Beardsley, or so much thereof as would be sufficient to satisfy the

debt, interest and costs of said action, and by summoning it in writing as garnishee by a written summons of garnishment, directed to said corporation and delivering the said amount of garnishment to said Breckenridge Jones, Vice-President thereof, requiring it to appear before said Circuit Court at the return term of said writ, to-wit, on the first Monday in April next, to-wit, April, A. D. 1906, to answer such interrogatories as might be exhibited and propounded to it by the plaintiff named in said summons; and your petitioner further shows that said writ also directed the sheriff of said city to summon the said John D. Beardsley to be and appear at the then next term of said Circuit Court and before the Judges thereof, on the first day of the then next term of said court to be holden in the City of St. Louis on the first Monday of April, 1906, to-wit, on the second day of April, 1906; and as appears from a further return made by said sheriff of said writ to said court as aforesaid, said sheriff also executed said writ on the 17th day of March, A. D. 1906, by delivering in said City of St. Louis, a copy of the writ and petition as furnished by the clerk of said court to John D. Beardsley, the defendant therein, thereby summoning the said defendant to be and appear before said court on the day named in said writ, which said summons was executed in the manner and form provided by the statutes of said State for the personal service of process in civil actions.

And your petitioner further shows to the Court that on the 17th day of March, A. D. 1906, and before the commencement of the April Term of said Circuit Court (that is before the first Monday in April, A. D. 1906), to which said writ of attachment and said summons of garnishment was returnable, and before the filing of the petition and bond for the removal of said action from said Circuit Court of the City St. Louis hereinafter set forth and described, and before and without the filing by your petitioner of the interrogatories which the laws of said State require to be filed by the plaintiff in cases of

garnishment and before the time limited in said laws for the filing of interrogatories had run or expired, and before the return day of said cause, to-wit, on the said 17th day of March, 1906, The Mississippi Valley Trust Company, garnishee in said action as aforesaid, filed in said Circuit Court of the City of St. Louis, answers to certain purported interrogatories, in which answer to said purported interrogatories it stated among other things, as follows:

(Answer of Garnishee.)

"Further answering said interrogatories, said garnishee states that it has in its possession property belonging to said John D. Beardsley, or in which he may be interested, consisting of the amounts of bonds of the Louisiana and North West Railroad Company hereinafter described.

"Said garnishee further states that it is a corporation organized under the laws of Missouri, and among other powers, is authorized to act as trustee under corporate mortgages; that it is trustee under a mortgage deed of trust of the Louisiana & North West Railroad Company, a corporation organized under the laws of the State of Louisiana, dated the first day of April, 1905, securing an authorized issue of bonds of said Railroad Company to the amount of $10,000,000 of even date with said mortgage, bearing interest at 5% per annum, payable semi-annually as evidenced by interest coupons thereto attached, which bonds are payable on the first day of April, 1935; that said mortgage provides none of said bonds shall be valid until authenticated by this garnishee as trustee and said mortgage fully sets out the terms and conditions upon which the bonds are to be authenticated; that said garnishee files herewith printed copy of said mortgage as Exhibit 'A' to this, its answer; that under article 2, section 1 of said mortgage, it is provided, among other things, that said garnishee, as trustee shall authenticate bonds to the amount of $1,725,000, face value, and deliver to the Railroad Company, or on its order, on filing with the trustee a copy of a resolution of the board of directors

of said railroad company, certified under the corporate seal thereof by a proper officer, requesting such delivery; that pursuant to the provisions of said mortgage, on or about the 12th day of February, 1906, there was filed with said trustees a certified copy of minutes of meeting of the board of directors of said railroad company held January 15, 1906, at which meeting said directors adopted resolutions directing the delivery of $1,725,000 face value of bonds, and under the terms of said mortgage it became the duty of said trustee to authenticate and deliver such bonds upon receipt of said certified copy of said minutes; that all of said bonds were authenticated as provided in said mortgage on the 16th day of February, 1906; that among the resolutions adopted by said board was a resolution as follows: 'The trustee in the first mortgage is further requested to deliver to J. D. Beardsley or order first mortgage gold bonds of the face value of $230,000, and to Geo. W. Hunter and J. D. Beardsley, or upon their joint order, first mortgage gold bonds of the face value of $320,000'; that none of said $230,000 or of said $320,000 of bonds have been delivered by said garnishee as trustee aforesaid, and at the time when garnishment process was served as aforesaid, said bonds duly authenticated were, and since that time have been, and at the present time are, in the hands of this garnishee as trustee under the conditions aforesaid. What are the rights of said Beardsley to said $230,000 face value of bonds or said $320,000 face value of bonds, this garnishee has no information beyond what is herein stated.''

And your petitioner further shows the Court that afterwards at the February Term of said Circuit Court and on the 17th day of March, A. D. 1906, and before the day of the commencement of said April Term aforesaid, and before it was required by the laws of the State of Missouri, or the rule of said State court in which said action was brought, to answer or plead to the said petition filed therein as aforesaid, the said John D. Beardsley, the defendant in said action, by his attorneys, Stewart, Eliot & Williams and Moore, Smith & Moore,

made and filed in said action in said Circuit Court in and for the City of St. Louis and State of Missouri, for the removal of said action from said court last aforesaid into the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, the Circuit Court of the United States to be held in the district where such action was pending, the petition and bond required for removal of causes by the third section of the Act of Congress of August 13, 1888, amendatory of the Acts of March 3, 1887, and March 3, 1875, which said petition was and is in the words and figures following:

(Petition for Removal.)

In the Circuit Court of the City of St. Louis, Missouri, April Term, 1906.

"Abram C. Wisner, Plaintiff,
vs.
John D. Beardsley, Defendant.

To the Honorable ....., *Judge of the Circuit Court of St. Louis.*

"Your petitioner respectfully shows that he is the defendant in the above entitled suit, and that he is a non-resident of the State in which the said suit was brought, to-wit, Missouri, and the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of $2,000;

"That the said suit is of a civil nature, being a suit, upon the first count, brought by the plaintiff for the breach of a contract or option given him by the defendant for the sale, transfer and delivery to plaintiff of a majority of the shares of the capital stock of the Louisiana and North West Railroad Co., together with the right, interest and title of the defendant in a certain contract between said defendant and the Louisiana & North West Railroad Co. for the issuance and delivery to the defendant of the first mortgage bonds of said Railroad Company of the aggregate face value of $1,725,-

000; that for the alleged breach of said contract plaintiff claims he was put to great expense and trouble, and expended a great deal of time, and suffered a loss of profits which he would have realized if the said contract had been performed and executed, to his damage in the sum of $85,000;

"And on the second count, for a balance of $15,000 that plaintiff alleges defendant is owing him for goods sold and delivered by plaintiff to defendant at his request and for moneys paid, laid out and expended by plaintiff for defendant, at his request, and for money lent by plaintiff to the defendant, at his request, and for moneys had and received by defendant to and for the use of the defendant.

"That the controversy in the said suit is only between citizens of different States, to-wit, your petitioner, who avers he was at the time of bringing this suit, and still is, a citizen of the State of Louisiana, and the said plaintiff who, as your petitioner avers, was then and still is, a citizen of the State of Michigan;

"And your petitioner herewith offers a bond with good and sufficient surety for his entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, on the first day of its next session, a copy of the record in this suit, and for paying the costs that may be awarded by the said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto;

"And your petitioner prays this Honorable Court to proceed no further herein except to make an order for the removal of this case to the said Circuit Court and to accept the said surety and bond and cause the record herein to be removed into said Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri and he will ever pray, etc.

STEWART, ELIOT & WILLIAMS,
MOORE, SMITH & MOORE,
Attorneys for Defendant."

"State of Missouri, }
City of St. Louis. } ss.

I, J. D. Beardsley, being duly sworn do say that I have read the foregoing petition and know contents

thereof, and that the statements and allegations therein contained are true as I verily believe.

J. D. BEARDSLEY.

Subscribed and sworn to before me this the 17 day of March, 1906.

JOHN MCCLUSKEY BLANEY, JR.,
Notary Public."

My commission expires the 13th day of Oct., 1909.

And upon said day last aforesaid at the February Term of said Court, the said petition for removal and bond required by said act, was presented to said Court, and said Court made and entered of record an order, in words and figures as follows:

(Order of Removal.)

Saturday, March 17, 1906.

On this day there is filed herein and presented to the Court the petition of the defendant removal to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, accompanied by bond in the sum of five hundred dollars ($500.00) in the form required by law with J. H. Allen and J. H. Stegall as sureties, which bond is hereby duly approved and it appearing that the defendant is entitled under the statutes of the United States to remove this case into the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, it is therefore ordered that this case be, and the same is hereby removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and it is further ordered that no further proceedings be taken in the cause in this court except the making of a transcript.

WALTER B. DOUGLAS,
Judge.

That afterwards and on the 19th day of March, 1906, being the first day of the then next succeeding term of the United States Court for the Eastern Division of the Eastern Judicial District of Missouri, within which division the City

of St. Louis is located, a duly certified transcript of the record of the proceedings of said Circuit Court of the City of St. Louis in said action was filed by said John D. Beardsley, defendant therein, in said Circuit Court of the United States for said Eastern Division of the Eastern Judicial District of Missouri, who thereupon entered his appearance therein, and said action was fully removed to said court last aforesaid.

And your petitioner further shows unto the Court that upon the removal as aforesaid of said action from said Circuit Court in and for the said City of St. Louis and State of Missouri to said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and before your petitioner had in any way appeared in said suit, or had done or been a party to any act, doing or proceeding in said suit, or had in any way acknowledged that said suit had been properly removed from said State Court to said Circuit Court of the United States, by appearance in, or by in any way prosecuting his said cause in said court, or doing anything whatsoever in said cause or connected with, or incident to the prosecution thereof, or had by any act or proceeding in said court acknowledged that said suit had been properly removed, or that said Circuit Court of the United States had jurisdiction by virtue of said removal, or otherwise, to retain said suit, or to take jurisdiction of said cause so removed as aforesaid, or to hold any plea therein, or take any step in the said cause, your petitioner appearing specially and solely for the purposes of the motion next hereinafter mentioned, and expressly denying that said court had jurisdiction of said cause, as appears on the face of said motion, did, on the 29th day of March, A. D. 1906, file in said Circuit Court of the United States, in said cause, a motion to remand said cause so removed as aforesaid to the Circuit Court of the City of St. Louis from whence it was removed, which said motion was and is in the words and figures following:

(Motion to Remand.)

In the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

"Abram C. Wisner, Plaintiff,
vs.
John B. Beardsley, Defendant.

"Now at this day comes plaintiff, by his attorneys, Jones, Jones & Hocker, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the Court to remand this cause to the Circuit Court of the City of St. Louis, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and the cause is not one within the original jurisdiction of this court, hence this court cannot acquire jurisdiction by removal.

JONES, JONES & HOCKER,
Attorneys for Plaintiff."

And your petitioner further shows to the Court that afterwards such proceedings were had in said Circuit Court of the United States, upon and in respect to said motion to remand, that said motion was duly heard by said court, and by the Honorable Gustave A. Finklenberg, Judge of the District Court of the United States, for said district, at the time holding the said Circuit Court of the United States, in pursuance to the statutes of the United States in such cases made and provided, and the motion having been duly considered by said court, said court did on the 2nd day of April, A. D. 1906, ren-

der its decision and judgment upon and in respect of said motion and did overrule said motion to remand said cause aforesaid, and did announce and file in said court a memorandum opinion or decision overruling said motion to remand, which is in words and figures as follows:

(Opinion on Motion to Remand.)

"A. C. Wisner, Plaintiff,
vs.
J. D. Beardsley, Defendant. } Memo. of Decision on Motion to Remand.

"FINKLENBERG, District Judge:

"In this matter I have examined the briefs submitted to me and the authorities therein cited so far as time would permit, particularly the cases of Foulk v. Gray, 120 Federal 156, and Rome Petroleum Company v. Hughes, 130 Federal, 585. I mention these two cases specially as representing the two views which may be taken of this question. In the absence of any controlling decision on this question and in view of the conflict of authorities, I can only follow what appears to my mind to be the more reasonable construction of the removal law, viz.: that under the circumstances prevailing in this case, it was removable, and that the motion to remand should be overruled.

"The question involved is a close one and I bear in mind that if the case is remanded there can be no appeal or review, of any kind, while if jurisdiction is retained, the decision of this Court, if erroneous, can be corrected.

"Since dictating the above my attention has been called to the case of Cochran v. Montgomery County, 199 U. S. 260. After due consideration of that case I do not think it settles the question here involved and I adhere to the above decision.

"The motion to remand will therefore be overruled."

And thereupon said Circuit Court of the United States for the district aforesaid made and entered an order of record that said motion to remand be, and the same was, overruled and denied.

And your petitioner further shows the Court that on the 27th day of March, A. D. 1906, the attorneys of said John D. Beardsley, defendant in said suit, served upon petitioner's attorneys a notice addressed to your petitioner, and to Jones, Jones & Hocker, his attorneys, that on the 30th day of March, 1906, and at 10 o'clock a. m., of that day, or as soon thereafter as counsel might be heard, they would present to said Circuit Court of the United States to which said cause was removed as aforesaid, a petition, of which a true copy was attached to said notice, at which time and place your petitioner or his attorneys might appear if they saw fit, and which said petition was filed in said cause on March 28, 1906, and prayed that the Mississippi Valley Trust Company, as garnishee in said cause, might be directed and ordered to turn over to the marshal of said court, such amount of the bonds garnished in its hands in said cause as aforesaid, as might be considered by the said Court sufficient to satisfy the claim of plaintiff in said cause and that upon compliance with the order of the Court to that effect said garnishee stand discharged, and that on said 30th day March, 1906, said petition was presented to said Court and your petitioner informed the said Court that he refused to appear in said cause for the disposition of said petition, or for any purpose whatsoever, and that he intended to apply to this Honorable Court for a writ of prohibition against the said Circuit Court of the United States retaining said cause on said removal aforesaid and assuming jurisdiction of said cause by virtue of said removal, or holding plea in said cause, or taking any steps or proceedings in said cause whatsoever except to remand said cause, and that thereupon said Court declared from the bench that it would withhold action on said petition last aforesaid in order that your petitioner might have an opportunity to make this application to this Court. And your petitioner further shows this Court that he has not since appeared in said cause or done any act or thing therein in any way acknowledging the jurisdiction of said Court

over said cause or over himself, or waiving his right to object to the jurisdiction thereof over said cause or himself, or acknowledging the right of said court to retain said cause in said court by virtue of said removal.

And your petitioner further shows to the Court that the second section of the Act of Congress, approved August 13, 1888, amendatory of the Act of Congress approved March 3rd, 1887, which amended the act approved March 3, 1875, after providing, in the first clause thereof, that causes of a civil nature, in law or in equity, arising under the Constitution, or laws, or treaties, of the United States (of which the Circuit Courts of the United States are by said clause given original jurisdiction by the preceding section), may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district, then provides in the second clause thereof as follows: **"Any other suit** of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction **by the preceding section"** (that is, by said section 1 of said act), "and which are now pending, or which may hereafter be brought, in any State Court, **may be removed** into the Circuit Court of the United States for the proper district by **the defendant or defendants therein, being non-residents of that State".**

And your petitioner further shows to the Court that the preceding section (being section one, of said act) referred to in said second section of said act, provides, in the first clause thereof, as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, **or in which there shall be**

a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", and the said clause of said first section goes on and gives jurisdiction of other classes of suits, but your petitioner further shows the Court that by the next clause of the preceding, or first section, of said act, it is provided, among other things, as follows:

> "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court and **NO civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant.**"

And your petitioner suggests to this Honorable Court that omitting the classes of suits of a civil nature removable under the first clause of the second section of said act, from the first clause of section one, all other classes of suits of a civil nature, specified in said first or preceding section of said act, remaining after such omission, fall within the terms "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section", and are removable under said section, except as hereinafter suggested, and that among the other classes of suits remaining after such omission, are those **"in which there shall be a controversy between citizens of different States** in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", that is, of two thousand dollars.

And your petitioner further suggests to the Court that said suit brought by your petitioner in the said Circuit Court

for the City of St. Louis and State of Missouri and removed therefrom to the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, as aforesaid (as appears from the face of the verified petition for removal of said cause from said Circuit Court of the City of St. Louis to said Circuit Court of the United States, and upon which said cause was removed as aforesaid from said Circuit Court for said City of St. Louis to said Circuit Court of the United States), is a suit in which there is a controversy between John D. Beardsley, the defendant therein, who was at the time of the bringing of said suit, and still is, a citizen of the State of Louisiana and who is and was a non-resident of the State of Missouri, and your petitioner, the plaintiff therein, who was at the time of the bringing of said suit and still is, a citizen of the State of Michigan and a non-resident of the State of Missouri, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, to-wit, in the aggregate sum or value of one hundred thousand dollars, and is therefore a suit in which there is a controversy between citizens of different States, involving the jurisdictional amount, and therefore removable under the said second clause of the said second section of said act, unless it is taken out of the operation of said second clause of said second section of said act by the effect of the second clause of the preceding (or first, or jurisdictional) section of said act.

And your petitioner further suggests to this Court that it nowhere appears in the said petition for removal above set out, and on which said cause was removed as aforesaid, or from any proceeding in said suit, that either the said John D. Beardsley, the said defendant in said suit removed as aforesaid, or your petitioner, the plaintiff in said suit, is either a citizen of the State of Missouri, or an inhabitant or resident of said Eastern District of Missouri, or of the Eastern Division thereof, in which said Circuit Court of the United States (to

which said suit was removed as aforesaid) is held, and over and within which said court exercises the jurisdiction conferred by said act; and your petitioner suggests that all that appears from the face of said petition for removal, upon which said cause was removed as aforesaid, and from the proceedings in said suit, is that said John D. Beardsley, the defendant in said suit, is a citizen of Louisiana and a non-resident of the State of Missouri, and that your petitioner, the plaintiff in said suit, is a citizen of Michigan as hereinbefore suggested, but your petitioner suggests that said showing is insufficient for the reasons now about to be assigned.

Your petitioner further suggests to this Honorable Court that the second clause of the preceding or first section of said act, hereinbefore quoted, restrains the jurisdiction conferred by the first clause of said preceding or first section of said act; that the last part of said second clause of said preceding, or first, section of said act, which provides, "but when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant" is by way of proviso to the preceding part of said second clause of said preceding or first section, which provides that **"no civil action shall be brought** before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant"; and further suggests that the words "district of residence of" in view of the previous legislation on the subject is equivalent to "district whereof he is an inhabitant", and that the effect is that where the jurisdiction is founded or attempted to be founded upon any of the causes mentioned in section one of said act, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant, but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit must be brought in the district in which either the plaintiff, or

in the district in which the defendant, resides, and cannot be construed as giving jurisdiction **by reason of citizenship,** to a Circuit Court held in a State **of which neither party is a citizen,** but on the contrary, restricts the jurisdiction **to the district in which one of the parties resides within the State of which he is a citizen,** and that it confers no jurisdiction upon the Circuit Court of the United States of any suit brought before such courts in a State of which neither party to said suit is a citizen and in a district of which neither party to such suit is an inhabitant and resident.

And your petitioner further suggests that his said suit so brought and removed as aforesaid, is a suit, as will appear from what has already been suggested and shown to this Honorable Court in which it does not appear from said petition for removal or anything filed or any proceedings had in this cause, that either of the parties thereto is a citizen of the State of Missouri or an inhabitant or resident of the Eastern Judicial District of Missouri, or of the Eastern Division thereof, and that the jurisdiction upon which said removal was had, and upon which said Circuit Court of the United States has refused to remand said cause, brought before it by said removal and upon which it has decided to retain same in said court and to take cognizance thereof and to hold plea therein, was and is solely founded upon the fact that the parties to said suit were, at the times it was brought and removed as aforesaid, and still are, citizens of different States, without it appearing in any wise in said cause from said petition for removal or on the record or from the proceedings therein, that either said John D. Beardsley, the defendant in said suit, or your petitioner, was at the time said suit was filed as aforesaid, or when it was removed as aforesaid, or since, or is now, a citizen of Missouri, or that either said defendant Beardsley, or your petitioner, was, when said suit was filed as aforesaid, or when it was removed as aforesaid, an inhabitant or a resident of said Eastern District of Missouri, or said Eastern

Division of said District, in which the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to which said suit of your petitioner was removed as aforesaid, is held, and jurisdiction is not given by said section one of said Act to the Circuit Courts of the United States of suits in which the jurisdiction is founded solely on the fact that there is a controversy between citizens of different States where it does not further appear that either the plaintiff or the defendant is a citizen of the State within which the suit is brought and an inhabitant and resident of the district to which it is removed.

And your petitioner further suggests to this Honorable Court that the removal of said cause under the second clause of the second section of said act, under which it must be removed as above suggested, depends on it being a suit of which said Circuit Court for the Eastern Judicial District of Missouri, as one of the Circuit Courts of the United States, is given jurisdiction by the first section of said act itself, and said Court not being given jurisdiction of such suits as that of plaintiff, for the reasons aforesaid, said suit of plaintiff does not come within the second clause of said second section of said act, and cannot be, and was not, lawfully removed under said section, but, on the contrary, the same was unlawfully and improperly removed as aforesaid, and neither said removal, nor said act, confers upon said Court any lawful authority or power to retain said cause in said Circuit Court, or for said Circuit Court to assume jurisdiction of said cause so removed into the same, or to hold plea in the same, or to do anything whatsoever in said cause, except to remand the same to said Circuit Court for the City of St. Louis, in which it was brought and from which it was removed, which it has refused to do as aforesaid.

And your petitioner further suggests to this Honorable Court that said suit so commenced by him as aforesaid, was, until its said removal as aforesaid, wholly before and within

the jurisdiction of said State court in which it was commenced as aforesaid, a jurisdiction wholly independent of, and different from, that of said Circuit Court of the United States to which said suit was removed as aforesaid, and derived and proceeding from another and altogether different sovereign, and was until said removal wholly from before, and wholly without, the jurisdiction of said Circuit Court of the United States to which it was removed as aforesaid, and that the sole, only and first **proceeding** by which said suit was brought before said Court as aforesaid, and at all within its cognizance, was the means by which said removal was effected as aforesaid, pursuant to said act of Congress, and for that reason **said proceeding** for removal was, and is, an **original proceeding** to bring said suit before the said Circuit Court of the United States and within its cognizance, within the meaning of the second clause of the first section of said Act of Congress; that the last part of the second clause of the first section of said act prohibits the bringing of any suit whatever "by any original process or proceeding" where the jurisdiction is founded only on the fact that the action is between citizens of different States, except only in the district of the residence of either the plaintiff or the defendant; that your petitioner's suit is one where the jurisdiction is attempted to be founded only on the fact that the action is between citizens of different States, and said petition for the removal of your petitioner's suit, made as aforesaid, does not show on its face, or in any way whatever, that either said John D. Beardsley, the defendant in said suit, or your petitioner, is either a citizen of the State of Missouri, or a resident or inhabitant of said Eastern District of Missouri, or of the Eastern Division thereof, the State, district and division of said district in which said Circuit Court of the United States before which said suit of your petitioner was brought by said original proceeding of removal, is held, and that by reason thereof said removal as aforesaid is within the said prohibition of said statute and is improper,

unlawful and in violation of the said act and laws of the United States in such cases made and provided, and said Circuit Court acquired, and could acquire, no jurisdiction whatever of, or over, said cause or your petitioner by virtue of said suit being brought before it by ruch removal as aforesaid.

And your petitioner further suggests to this Honorable Court that if said suit had been brought by original process in said United States Circuit Court, to which it was removed as aforesaid, the citizenship being the same, so that the complaint (or bill) did not, and could not, show that either the plaintiff or the defendant therein was a citizen of the State or an inhabitant or resident of the district or division of the district in which said court was held, then upon proper objection made by the defendant (to-wit, that being defendant, he was not subject to the jurisdiction of said court on account of said prohibition of said act, unless he voluntarily submit himself to its jurisdiction), the Court would refuse to entertain jurisdiction of said cause and dismiss the cause, and if he voluntarily submitted himself to the jurisdiction of said court instead of objecting to its jurisdiction, then both the plaintiff (by bringing said suit in said court), and the defendant (by voluntarily appearing in said cause), would have submitted themselves voluntarily to the jurisdiction of said court and the court would therefore have jurisdiction to proceed with the cause.

And your petitioner further suggests to this Honorable Court that when the cause is brought in the first instance in a State court, that said act forbids the same being brought by the original proceeding of removal, before said Circuit Court of the United States, when it does not appear from the petition of removal that either the said plaintiff or the said defendant therein is a citizen of the State, or an inhabitant or resident of the district or division of the district, in which the said Circuit Court of the United States to which it is so removed, is held, and the said act by further providing that the party removing shall give bond to pay costs, if said Circuit

Court shall hold that said suit was wrongfully or improperly removed, and by providing that whenever said Court shall decide that said cause was improperly removed it shall remand the same to the State court from whence it came, and because of the prohibition in said second clause of said first section of said act against the bringing of said suit except as therein provided before said Circuit Court of the United States, clearly gives the plaintiff in case of removal the right to object to the jurisdiction of said Circuit Court to which the said suit was removed both on account of a wrongful, and also of the improper removal of said suit; so that to give jurisdiction in case of such a wrongful or improper removal not only must the defendant submit himself to the jurisdiction of the Court to which he removes said suit, and thus waive his privilege to the prohibition of the act aforesaid, but the plaintiff must submit himself to said Court to which the removal is made (either expressly, or by failing to avail himself of the prohibition of the act aforesaid by objecting in said Court, to said removal as wrongful and improper and moving the Court to remand the case); hence your petitioner suggests that in the bringing of this suit before the Court by the **original proceeding of removal,** as in case of bringing suit before the Court by **original process,** not only the party bringing the suit before the Court by removal (that is, **the defendant), must acquiesce** in the jurisdiction of the Court to which removal is made over the said prohibition of said act, but **the plaintiff also must acquiesce therein,** and your petitioner further suggests that he has not, as shown by the record in said cause in said Circuit Court of the United States to which said cause was removed, acquiesced, in any way, in the assumption of jurisdiction of said case by said Circuit Court of the United States to which said cause was removed as aforesaid, but, on the contrary, he has at all times objected to said Court retaining said cause, or assuming jurisdiction thereof, by virtue of said removal, or otherwise, or of holding plea therein, or to its doing anything

whatsoever in or about the same, except remand said cause to said State Court from which it came, as in such cases provided in said act.

And your petitioner further suggests to this Honorable Court that there is and has been for a long time past a great conflict of decision among the courts of the United States, over which this Honorable Court has supervisory jurisdiction, in respect to the question of removal to, and of the jurisdiction of, the Circuit Courts of the United States, which is now brought before this Honorable Court by this application; that in some jurisdictions said courts hold such removals proper and lawful and that they have and acquire jurisdiction of causes so removed, notwithstanding the objection of the other party on the grounds aforesaid, and they retain causes so removed, and assume and exercise jurisdiction over the same by virtue thereof, while in other jurisdictions said courts hold such removals to be wrongful and improper and deny their jurisdiction by virtue of any such removals and remand the causes so removed to the State courts from which they came; that such contrariety of opinion and decision is clearly pointed out in the opinion of the Court herein before quoted, denying petitioner's motion to remand; and it is for this reason (beside the wrong about to be done by the said Court of exercising jurisdiction in excess of that conferred by the laws of the United Stafes, and in violation of said laws, and to the wrong and injury of your petitioner), the duty of your petitioner to bring said matters involved in this application to the attention and before this Court, that this Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further suggests to this Honorable Court that the decisions of the courts of the United States over which this Honorable Court has supervisory jurisdiction and control, upon and in reference to such removals as are brought before this Court by this application, and the juris-

diction of said Circuit Courts of the United States by virtue of such removals over the causes so removed, and over the plaintiffs therein objecting to the jurisdiction, and the right of said Circuit Court to retain such removals against the timely objection of plaintiffs therein, are, as your petitioner is advised, in conflict with the decisions and utterances of this Court, so far as they have gone, in construing the first and second sections of said act of Congress, and the prior similar acts, and that for this reason it is the duty, and it is right and proper, and your petitioner ought, to bring said matters involved in this application to the attention, and before this Court, in order that the Honorable Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further shows unto this Honorable Court that all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, and which are recited and alleged as facts of which your petitioner is advised, appear from the record of said suit so brought by your petitioner and the proceedings in said State court and in said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri to which said suit was removed as aforesaid, a copy of which record containing the proceedings in said State court as filed in said Circuit Court of the United States upon the removal of said cause thereto, and the record of the action and proceedings of said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, since the removal of said cause to it as aforesaid, is filed with this application.

And your petitioner further suggests to this Honorable Court that notwithstanding the premises, the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, by the overruling of said motion of your petitioner to remand said suit to said State

court from which it was removed as aforesaid, has decided and determined to retain said cause in court and to assume and to exercise jurisdiction over the same by reason of it having been brought before by said court by removal as aforesaid and to hold plea therein, and that said Court will retain the same by reason of its said decision and determination on said motion to remand, and is about to, and will, assume and exercise jurisdiction over the said suit so removed, and hold plea therein, and will assert and attempt to exercise jurisdiction over said suit so removed, and hold plea therein, all in excess of the jurisdiction conferred upon it by the said act and the laws of the United States, and in contempt of said act and the laws of the United States, and will compel your petitioner either to abandon his said suit, or to submit himself to the jurisdiction of said court in said suit, by virtue of said removal and the retention thereof in said court and the wrongful and unlawful assertion and exercise by said court of jurisdiction as aforesaid, and your petitioner is advised that the question involved in this application is whether the said Circuit Court of the United States has jurisdiction at all of said suit so removed as aforesaid under said petition of removal, and to retain the same in said court where your petitioner has not waived his right to object to such wrongful and unlawful assertion and exercise of jurisdiction as said court has and is about and will exercise by reason of its retaining said cause in said court and refusing to remand it as improperly and wrongfully removed and not within its jurisdiction; and your petitioner is further advised that if he shall appear in said suit in said court or do any act or thing to recognize the right of said court to take cognizance of said suit in said court and hold plea therein, he will thereby forfeit and waive his right thereafter to object that said removal of said suit so had as aforesaid was and is

wrongful and improper and be precluded from afterwards asserting that exercise of jurisdiction which said Circuit Court has, and is about to, and will assert and exercise over said suit, was and is wrongful and unlawful and improper and in excess of its jurisdiction given by said act and the laws of the United States, and that your petitioner has and will have no adequate remedy, or any remedy, against such unlawful and wrongful exercise of jurisdiction which said court has, is about and will exercise as aforesaid in retaining said suit in said court and taking cognizance thereof and holding plea therein as aforesaid for that petitioner is without the right of effective appeal, notwithstanding the power of this court to review cases involving jurisdiction by removal, for that petitioner cannot appear in said cause, and invoke the processes of the court (as he must do continually being plaintiff therein), and afterwards object to the jurisdiction thus from time to time invoked by him.

Wherefore your petitioner, the said Abram C. Wisner, the aid of this Honorable Court most respectfully requesting, prays remedy by writ of prohibition to be issued out of this Honorable Court to the said Honorable Gustave A. Finklenberg, Judge of the District Court of the United States for the Eastern Judicial District of Mo., holding the said Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Mo., before whom said cause is pending, to be directed, to prohibit him from asserting and exercising jurisdiction over said suit so removed as aforesaid, or to hold plea therein, the premises aforesaid, anywise concerning further before him, in said Circuit Court, or from retaining said suit in said Circuit Court by virtue of said removal, or from taking any steps in the said suit so removed as aforesaid, except to remand the same pursuant to the statutes of the United States in such cases made and provided to said Circuit Court for the City of St. Louis and State of Mis-

souri from which it was removed to said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

James C. Jones

Of counsel for Petitioner.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

James C. Jones

Of counsel for Petitioner.

FILE COPY.

In the Supreme Court of the United States

Original Proceeding No. 9
Original Proceeding No. 10

Office Supreme Court U. S.
FILED
MAY 12 1906
JAMES H. McKENNEY,

EX PARTE ABRAM C. WISNER

BRIEF AND ARGUMENT FOR PETITIONER
(Applications for Prohibition and Mandamus)

9&10 Orig'l.
O.T.1906

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In the Supreme Court of the United States

Original Proceeding No. 23
Original Proceeding No. 24

EX PARTE ABRAM C. WISNER

BRIEF AND ARGUMENT FOR PETITIONER

(Applications for Prohibition and Mandamus)

The petitioner (A. C. Wisner), a resident of Michigan, instituted a civil action at law in which he seeks to recover $100,000 against John D. Beardsley (a resident of Louisiana), in the State Circuit Court of the City of St. Louis. A writ of attachment issued under which certain bonds were attached in the hands of the Mississippi Valley Trust Company (a Missouri corporation), located at St. Louis, and that company was summoned as garnishee. The defendant, Beardsley, being found in that city, a writ of summons was personally served upon him in St. Louis.

Before the return day of the writ of summons, and before the arrival of the date on which the garnishee was required to answer the summons of garnishment, the garnishee appeared in the State court and admitted

having in its hands certain bonds, the property of Beardsley. At the same time Beardsley appeared and filed his application to remove the case to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, within which division and district the City of St. Louis is located, and, having given the requisite bond, the State court (*ex parte*) granted the application and ordered the cause removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

The petition for removal alleges (as the sole and only ground for removal) that the defendant, Beardsley, is a non-resident of the State of Missouri, that the controversy is between citizens of different States, that Beardsley is a resident of Louisiana, and that Wisner, the plaintiff (petitioner here) is a resident of Michigan.

On the first day of the next term of the said United States Court (March 19th, 1906) Beardsley entered his appearance in that court and filed therein a transcript of the record in the case, and immediately thereafter the plaintiff in the case, Wisner (petitioner here) appeared in that court (limiting his appearane specially and solely for the purposes of his motion) and moved the said United States Court to remand the case to the State court from whence it came, for the reason that the suit did not involve a controversy within the jurisdiction of said United States Court because the plaintiff, being a resident of Michigan, and the defendant, being a resident of Louisiana, the cause was not within the original jurisdiction of the said United States Court and hence it could not and did not acquire jurisdiction by removal.

The application to remand was denied, Judge Finklenburg (the District Judge holding the said United States Circuit Court) expressing in his written opinion (page 12 of the petition filed in this Court) his appreciation of the closeness of the question involved and his determination to retain the cause because of his belief (we think an erroneous belief) that if he retained the case his action might be reviewed, and, if erroneous, corrected on appeal, whereas if he remanded the cause there could be no review of his action.

Thereupon the petitioner (Wisner) declined to appear further in the cause, and, having advised Judge Finklenburg of his intention so to do, filed in this court his applications for Prohibition and Mandamus directed to the said United States Circuit Court, commanding that it take no further cognizance of the case except to remand the case to the State court from whence it came. Pending the prepartion of these applications, no further proceedings were had in the United States Court, and, in due course, these applications having been prepared and presented, a rule to show cause why the writs prayed for should not issue was granted by this Court, and acceptance of service acknowledged and filed herein.

It is in support of these applications that we submit for the consideration of the Court the following brief and argument:

I.

As to the Right of Removal.

The Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri has no jurisdiction, original or otherwise, of the suit

removed by reason of the diverse citizenship of the parties which appears from the petition for removal and the record, inasmuch as neither party is a citizen of the State or a resident or inhabitant of the district in which said court is held, and the case could not, therefore, be lawfully removed to said court from the State court, and said court of the United States could not have, and does not have, any jurisdiction whatever over it by reason of said removal, the sole ground for which was the diverse citizenship of the parties.

a. The jurisdiction of the United States Circuit Courts of suits involving controversies between citizens of different States, was (both at the time the suit involved in this application was brought in the State court, and when the removal was had), and now is, derived from and dependent on, the Act of Congress, approved August 13, 1888, and in construing this act this Court has held, and repeatedly affirmed, that the second clause of the first, or jurisdictional section of the act, which declares, "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court, and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, **but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant**", etc., restricts the general grant of original jurisdiction made in the first clause of that section, so that the effect is: "As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the

same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant', **and cannot be construed as giving JURISDICTION, BY REASON OF CITIZENSHIP** to a Circuit Court **held in a State of which neither party is a citizen, but, on the contrary, restricts the JURISDICTION to the district in which one of the parties resides WITHIN the State of which** he is a citizen; and that this act, therefore, **having taken away the alternative,** permitted in the earlier acts—**of suing a person in the district 'in which he shall be found', requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, TO BE BROUGHT IN THE STATE OF WHICH ONE IS A CITIZEN, AND IN THE DISTRICT THEREIN OF WHICH HE IS AN INHABITANT AND RESIDENT.**" In other words, the general grant of **original jurisdiction** in the first clause does not include a grant of original jurisdiction of a suit, when the jurisdiction is sought to be founded only on the fact of the diverse citizenship of the parties to the suit, where it does not appear that one of the parties to the suit is a citizen of the State and an inhabitant and resident of the district in which the Circuit Court in which it is brought is held; that is, the first clause of the act confers no original jurisdiction of the suit on the Circuit Court by reason of diverse citizenship, if neither plaintiff or defendant resides in the district, although the parties may be citizens of different States. The record shows that neither of the parties to the suit involved in this application resided in the Eastern Judicial District of Missouri, so that it could not have been maintained in

that Court if it had been brought there originally by original process.

Act August 13, 1888, 25 State at Large 433
Shaw v. Quincy Mining Co., 145 U. S. 444, 448 and 449.
McCormick v. Walthers, 134 U. S. 43 and 44;
Smith v. Lyon, 133 U. S. 319;
St. Louis Ry. v. McBride, 141 U. S. 128 and 129.

b. The second section of the Act of August 13, 1888, was (when the suit was brought and removed), and still is the law authorizing removals from the State courts to the United States Circuit Courts, and under which the suit involved in this application was removed. This section, after providing in the first clause thereof for the removal of causes of a civil nature, in law and in equity, arising under the Constitution, or laws, or treaties of the United States, of which the United States Circuit Courts are by the first clause of the first section of the act given original jurisdiction, then proceeds to provide for the removal of the remaining classes of cases of which those courts are given original jurisdiction by the first section of the act, including those where jurisdiction is founded only on diverse citizenship of the parties, as follows: "**Any other suit** of a civil nature, at law or in equity, **of which the Circuit Courts** of the United States **are given jurisdiction** by the **preceding section**," (that is, by section 1), "and which are now **pending, or** which may **hereafter** be **brought in any State court,** may be removed into the Circuit Court of the United States for the **proper district** by the **defendant or defendants therein, being non-residents of that State.**"

This Court has held, and declared it to be settled, that in order to make a suit removable under this section of the act it must be one which the plaintiff could have brought originally in the United States Circuit Court, to which it would be removed by original process.

Traction Co. v. Mining Co., 196 U. S. 245–6;
Mexican Nat. R. R. v. Davidson, 157 U. S. 208;
Cochran v. Montgomery Co., 199 U. S. 272;
Tenn. v. U. & P. Bank, 152 U. S. 454;
Metcalf v. Watertown, 128 U. S. 586;
Minn. v. Northern Securs. Co., 194 U. S. 48–63 and 64;
Boston Mining Co. v. Montana Ore Co., 188 U. S. 640;
Cates v. Allen, 149 U. S. 459 and 469;
Sweeney v. Castor Oil Co., Sup. Ct. Rep., Vol. 26, No. 5, p. 55;
So. Pac. Co. v. Denton, 146 U. S. 202;
Anderson v. Watt, 138 U. S. 701, 702;
Neel v. Penn. Co., 157 U. S. 153, 154;
Hanrick v. Hanrick, 153 U. S. 198;
Powers v. C. & O. Ry., 169 U. S. 99;
M. C. & L. M. Ry. v. Swan, 111 U. S. 379.

The latest utterance of this Court on this subject is the Cochran case (199 U. S. 260) where your Honors say:

> "The Act of 1887 restored the rule of 1789 and as we have heretofore decided, **those suits only can be removed** of which the Circuit Courts are given original jurisdiction."

We have here not only a concise and emphatic declaration of the rule by this Court in that case, but also an **interpretation of its former opinions.** It is well to note that the case of Rome v. Hughes, 130 Federal 585

(cited in Judge Finklenburg's opinion), is founded on a construction of the previous opinions of this Court, **which construction** is seemingly **repudiated** in the Cochran case, *supra*.

Again the Court says in the Cochran case:

> "To hold otherwise brings the language of the clause into conflict with **the rule** that **a suit, to be removable** must be within the **original jurisdiction** of the Circuit Court, departs from the **settled former construction,** and ignores the **main purpose** of the Act of 1887, which was to **restrict** the jurisdiction of the Circuit Court."

And again this Court says in the Cochran case:

> "The main purpose of the Act of 1887 was, as has been repeatedly held, to restrict the jurisdiction; and this was largely accomplished in the matter of removals by withholding the right from plaintiffs and **only according it to defendants when sued in plaintiff's district.** * * * It (the suit) could not have been brought in the middle district of Alabama; and **this being so** the case was **improperly removed** and should be remanded."

In Mexican National R. R. v. Davidson, 157 U. S. 201, this Court, through Chief Justice Fuller, says:

> "We must hold, therefore, as has indeed already been ruled in Tennessee v. Bank, 152 U. S. 454, 461, that the jurisdiction of the Circuit Courts **on removal** by the defendant, under this section, **is limited to such suits as might have been brought in that court by the plaintiff under the first section.**"

In Tennessee v. Bank, 152 U. S. 454, 461, Mr. Justice Gray says:

> "Section 2 allows removals from a State court to be made only by defendants, and of suits of

> which the Circuit Courts of the United States are **given jurisdiction by the preceding section**; thus limiting the jurisdiction of a Circuit Court of the United States on **removal** to such suits as might have been **brought** in that court by the plaintiff under the first section. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the Circuit Courts of the United States."

We have purposely omitted any discussion or extended citation of cases decided by any other court, believing that all the light needed is found in the previous utterances of this Court. But the confusion resulting from the contrariety of opinion existing in the Circuit Courts and the several courts of appeal are clearly indicated by the two cases referred to in Judge Finklenburg's opinion—Rome v. Hughes, 130 Fed. 585, and Foulk v. Gray, 120 Fed. 156. The opinion in the latter case cites nearly if not all of the pertinent cases, and we beg your Honors' careful consideration of the seemingly unanswerable reasoning employed by Judge Keller in that case.

II.

The right given to the non-resident defendant or defendants by the second clause of section 2 of said act, to remove the cause from the State court to a United States Circuit Court is not absolute; it is subject to the other limitations of that clause, *i. e.*, that it must be a suit within the jurisdiction of the United States Circuit Court, and that it must be removed to the **proper district**, and, therefore, it does not authorize him or them to remove it to a United States Circuit Court held in a

district **wherein** the United States Court has **no jurisdiction of the suit removed,** or to any other judicial district beyond the State, or part of the State, which constitutes the district in which the suit is pending.

The proceeding of removal is an original indirect proceeding, whereby the suit is removed (where the removal is rightfully and lawfully made) from wholly within the jurisdiction of the State court to wholly within the jurisdiction of the United States Circuit Court to which it is so rightfully and lawfully removed. The plaintiff has not and does not appeal to the jurisdiction of any United States Circuit Court, nor has he brought his suit in a district wherein the defendant cannot be sued within the meaning of the removal act. He has not invoked the jurisdiction of the United States Court; he has not consented to the exercise of jurisdiction by that court over his person; nor has he waived his right to object to the exercise of jurisdiction over him, since he only does this when he submits himself to the jurisdiction of the United States Circuit Court by bringing his suit originally therein, or by appearing and in some way invoking the process of or consenting to the exercise of jurisdiction of that court.

In the removal proceeding under consideration, the defendant is the actor, seeking to avail himself of a right given him, or which he supposes is given him by the statute, and consequently no question of waiver of the right to be sued in a particular district arises, except that the defendant by his own act, in bringing the suit by removal before the United States Circuit Court, estops himself, and himself only, from afterwards asserting the want of jurisdiction of the court of the suit.

The plaintiff, not having submitted himself to the jurisdiction of the Circuit Court to which the case has been removed (either by bringing his suit therein or by afterwards, by any act of his, waiving the want of jurisdiction of the court in any way), is at full liberty to object to the total want of jurisdiction of the United States Circuit Court of the cause after its removal and to insist on the same.

(*a*) The proceeding of removal is an **ORIGINAL** but indirect proceeding by which **the United States Circuit Courts acquire original jurisdiction** of a cause.

"Original" means "pertaining to the beginning or origin, the first or primitive form of a thing."

Com. v. Schollinberger, 156 Pa. St. 213;
Haley v. State, 42 Neb. 561.

"Original", the first in order of time, **primary**.

Anderson's Law Dictionary, p. 739, "Original".

"Original" is from "origo".

Ibid, Note 2.

"Original."—"Primitive; first in order, bearing its own authority, and not deriving authority from an outside source, as original jurisdiction, original writ", etc.

Black's Law Dictionary, p. 857.

"Original" proceeding is defined thus: A proceeding in a civil action is an act necessary to be done in order to attain a given end. **It is a prescribed mode of action for carrying into effect a legal right.**

Rich v. Husson, 1 Duer 620.

The removal is only an indirect mode by which the Federal Court acquires **original** jurisdiction.

Virginia v. Rives, 100 U. S. 337;
Ry. Co. v. Whitton, 13 Wall. 287.

b. The proceeding for removal, as has been pointed out above, is an original indirect proceeding by which the suit was brought before the United States Circuit Court. By this proceeding on the part of the **defendant,** the cause was taken from wholly within the jurisdiction of the State court (a jurisdiction exercised under and derived from a wholly different sovereign, from that under and from which the United States Circuit Courts derive their jurisdiction), and was attempted to be brought wholly within the jurisdiction of the United States Circuit Court. If it got within the jurisdiction of the United States Circuit Court for any purpose, therefore, defendant was the actor, or instrument, by which it was done.

The defendant having himself brought the case before a Federal court where he was not liable to be sued, does not raise a question of waiver of his own right, but, as to himself, he simply submits himself thereby to the jurisdiction of such court and estops himself from afterwards contesting its jurisdiction. As to the plaintiff, the defendant merely brings him into a court which has no jurisdiction of the cause, because the case is not removable under the second section of the act, inasmuch as the jurisdiction being wholly dependent on diverse citizenship, it affirmatively appears, from the petition of removal and the record, that neither party to the suit is a citizen of the State or an inhabitant or resident of the district in

which the Circuit Court to which it is removed is held. While it is true that the defendant in doing this has waived **his** right of not being sued in **that** court, yet that does not arise from the act of the **plaintiff** in suing him in a district where he was not liable to be sued (for he was liable to suit in the State court), but arises from his own voluntary act, and choice of that tribunal, and the exercise by defendant of such right in no way estops the **plaintiff** (who has not submitted himself in any way to the jurisdiction of the court) from urging **his, the plaintiff's** right to object to being sued, for the want of jurisdiction, in the Federal Court: (1) Because the suit was not removable under the act, and (2) because that diverse citizenship is not shown which gives the court jurisdiction of the cause.

The removal act itself gives him the right to move to remand, and what is still more convincing it further makes it the duty of the Circuit Court to remand the cause.

c. Neither the right given the defendant to remove the cause in the 2nd clause of the 2nd section of the act, nor the requirement to remove it "into the Circuit Court to be held in the district where such suit is pending" is an absolute right, but is a right given solely where the other conditions of the second clause can be and are fully complied with.

In the first place by the said second clause it must be a suit of which the Circuit Court to which it is removed has jurisdiction under the first section of the act (that is, under the first clause as restricted by the second clause of said section); and as appears above, such is not the case in regard to the suit involved in this application.

In the next place clause 2 of section 2 gives the right to remove only into a court of the **"proper district"**. As shown above, this Court has held, and repeatedly affirmed the holding, that, as to natural persons, where the jurisdiction is sought to be founded only on the fact that the parties are citizens of different States, as in the case involved in these applications, the act requires the suit to be brought in the State of which one of the parties is a citizen and in the district therein of which he is an inhabitant and resident, and the act **is not to be construed as giving jurisdiction, by reason of citizenship,** to a Circuit Court, **held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen.**

This Court has repeatedly decided that the only districts in which a defendant can be sued under the act of 1888, is that of the residence of the plaintiff, and that of the residence of the defendant;

> Smith v. Lyon, 133 U. S., *loc. cit.* 319;
> McCormick v. Walthers, 134 U. S., *loc. cit.* 44;
> Mex. Nat'l Bank v. Davidson, 157 U. S., *loc. cit.* 208;
> Shaw v. Quincy Mining Co., 145 U. S., *loc. cit.* 448-9,

and such district is, therefore, the only **"proper** district", within the meaning of the first section of the act. "Proper district" within the meaning of the second clause of the second section means either of the districts (*i. e.*, one of the districts) made "proper districts" by the first section of the act. Hence when the third section requires the petition to be **"for the re-**

moval of such suit into the Circuit Court to be held in the district where such suit is pending", it contemplates that the suit shall **be pending** in a "proper district", in which case only can it be removed as directed in the third section.

Otherwise interpreted the act would authorize a removal into a court having no power to take cognizance of it as a removed cause, and whose duty it would be under the act to remand it again to the State court, and it cannot be reasonably supposed Congress ever intended such a useless and absurd proceeding.

d. In bringing his suit plaintiff did not seek the Federal jurisdiction at all; he did not bring it in any Federal court; he did not bring it in the Federal court of any district; but brought in the State court in a jurisdiction wholly without that of the Federal courts, and wholly within that of another and different sovereign. He did not, therefore, bring his suit in a district of Federal jurisdiction within which the defendant was not liable to be sued, and hence, in bringing his suit he did not produce that situation where he had submitted himself to the jurisdiction of a court where he could not sue the defendant and had brought the defendant into that court to answer although defendant was not liable to suit therein, and where defendant when so brought in could, by objecting, oust the jurisdiction of the court, or where if he preferred (as his exemption from liability to be sued in that court was in the nature of a privilege which he could waive), he might, when so called on by plaintiff to answer in such court, waive his privilege, and thus submit himself to the jurisdiction of the court and thus give it jurisdiction of

the cause. Such a situation can only arise where plaintiff sues originally in the Federal court, and thus calls on defendant either to object to the jurisdiction or to waive the privilege he has of not being sued in that court and submitting to its jurisdiction. For this reason it does not fall within the principle of the cases which apply when the question of waiver is raised by suit being brought originally in the Federal court.

Central Trust Co. v. McGeorge, 151 U. S. (*loc. cit.*) 134;
Shaw v. Mining Co., 145 U. S. 453.

III.

Although the suit was not removable under the second section of the act, and, for that reason, the Circuit Court to which it was removed acquired no jurisdiction of it through the removal, yet, as this want of jurisdiction arose, not from something absolutely essential to vest jurisdiction, but from something in the nature of a personal privilege of the party **against whom jurisdiction is being asserted,** it can be waived.

If waived, as the Court has general jurisdiction otherwise of the suit, the jurisdiction of the Court would become complete and attach independent of the removal, but solely because **the waiver brought the cause within the jurisdiction** of the Court.

Such waiver may be effected in such a contingency, by either a general appearance, or any imparlance, answer, plea, or other act whatsoever, which recognizes that jurisdiction of the cause exists in the court.

If, therefore, after removal, the plaintiff in the case involved in this application, shall appear in the case, or recognize jurisdiction as existing in the Court over

the cause, in any of the ways mentioned above, the Court will acquire jurisdiction of the cause, by reason of its general jurisdiction thereby being completed and attaching, although he may have previously properly protested against the exercise of jurisdiction, and he will thenceforth be estopped, both in that court, and on error or appeal, from raising the question of the primary jurisdiction of the Court of the case, either on the ground of the unlawful and wrongful removal, or any other ground whatever.

Central Trust Co. v. McGeorge, 151 U. S. 134–5;
St. Louis Ry. v. McBride, 141 U. S. 131;
Wabash Ry. v. Brow, 164 U. S. 280;
In re Cooper, 143 U. S. 473;
Interior Const. Co. v. Gibney, 160 U. S. 219–20;
Texas & P. Ry. v. Saunders, 151 U. S. 109;
Martin v. B. & O. R. R., 151 U. S. 688;
French v. Hay, 22 Wall. 238;
Pollard v. Dwight, 4 Cranch 421.
So. Pac. Co. v. Denton, 146 U. S. 205, 206;
Bacon's Abrdgmt., Vol. 8 (Prohibition K), citing 2 Mod, 271, 272; Welthosen v. Ormsley, 3 Durnf. & East, 316.

IV.

As to the Remedy.

As neither party to the suit involved in this application and removed into the Circuit Court of the United States for the Eastern District of Missouri, was a citizen of the State or an inhabitant or resident of the district in which said court was held, which, being jurisdictional, must appear from the face of petition for removal (but does not; but instead it appears therefrom that the contrary was the case), the action removed was not one

which could have been originally brought in that circuit court for want of the requisite citizenship, and was, therefore, not removable under the act of 1888, and consequently the circuit court into which it was removed acquired no jurisdiction of the case by virtue of its removal, but was and is wholly without jurisdiction of the same, the plaintiff not having in any way admitted jurisdiction in the court of the case, but, as authorized by the act, has objected to the jurisdiction, by a timely motion to remand the same to the State court on account of the want of jurisdiction of the court into which it was removed to entertain the same, and it was the duty of the court into which it was removed, by the express terms of the act, to remand the same to the State court. But instead of remanding the cause as the law commanded and made it its duty to do, the court overruled the motion to remand, and thereby retained the cause in that court, assumed jurisdiction of it, which the existing law did not confer upon it, and is about to exercise jurisdiction of it, and to hold plea therein and proceed to the final determining thereof, which it is wholly without authority to do. That court then, the Circuit Court of the United States for the Eastern District of Missouri, has assumed and exercised and is continuing and about further to exercise a jurisdiction **wholly in excess of that conferred upon it,** in violation of the direct command of the law, and of the duty imposed on it by the law, and to the irreparable wrong of the plaintiff, the petitioner. Besides, if this Court do not grant relief, plaintiff must either abandon his action, or **admit** the jurisdiction of the court, by appearing therein and defending the same, and **thereby waive irrevocably** his right to insist on his objection to the

unwarranted assumption of jurisdiction and his right to have the case remanded to the State Court for trial there in that court and on error or appeal therefrom in the State Supreme Court.

And even if the waiver were not irrevocable, yet as no appeal or error lies at this stage of the case, he would be compelled to bear the expense, delay and trouble of a trial in the said Circuit Court to which it is removed to a final determination, every step in which would be an absolute nullity, and then bear the expense, delay and trouble of an appeal to this Court from that nullity, only to have this Court declare it a nullity, vacate it as such, and remand the cause to the United States Circuit Court to be by it remanded to the State Court from whence it came. A remedy by appeal or writ of error which would grant no other relief for the action of the Court complained of would be manifestly wholly inadequate, since it would not restrain the Circuit Court from retaining the cause, and assuming and exercising and continuing to assume and exercise to final judgment and appeal, the excess of jurisdiction it has assumed and exercised and is continuing to assume and exercise. In either situation, both the interest of parties, and the public interest, require that the Circuit Court should be restrained within the lawful limits of its jurisdiction now that such results may be prevented, and plaintiff may be enabled to enforce his right in the courts according to the law of the land. This can only be done through the supervisory jurisdiction of this Court through its writs of prohibition and mandamus.

a. The petition of removal, and also the record, show on their face, that the suit, involved in the applications,

is one of which the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, to which it was removed, under the statute as interpreted by the repeated decisions of this Court, has no original jurisdiction, and that there has been no waiver of his rights by the plaintiff, and, therefore it shows an **entire and complete** want of jurisdiction in that Court of or over it; it further shows, that it has retained the cause, has assumed jurisdiction of and over it, and is exercising and intends, and is about to and will continue to exercise jurisdiction of and over the same to a final determination thereof. Thus it clearly appears that in all this it is proceeding clearly beyond and outside of its jurisdiction as conferred by law and interpreted by this Court, and that it intends to continue to do so, that is, exercising and intending to exercise jurisdiction clearly in excess of and beyond that conferred on it by law. In such case prohibition is proper.

In 2 Coke's Inst., title *Articuli Cleri*, 602, it is said:

> "Prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute anything, **which by law they ought not to hold plea of;** and they are much mistaken that maintain the contrary." * * * "And the King's courts that may award prohibitions, being informed, either by the parties themselves or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that (whereof they have not jurisdiction), may lawfully prohibit the same, as well after judgment and execution as before."

This was cited by Alderson, B., with approval, in Carter v. Southall, 3 M. & W. 126–7.

In *in re* Alix. Pet., 166 U. S. 137, this Court said: The settled rules in reference to the writ of prohibition

were thus laid down in *In re* Rice, Petitioner, 155 U. S. 396, 402:

> "Where it appears that the Court whose action is sought to be prohibited **had clearly no jurisdiction** of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, **is entitled to a writ of prohibition as a matter of right.** But when there is another legal remedy by appeal or otherwise, or when the question of the jurisdiction of the Court is doubtful, or depends on facts which are not made matter of record, or when the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory when the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings." Citing Smith v. Whitney, 116 U. S. 167, 173.
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> *Ex parte* Easton, 95 U. S. 77;
> *In re* Morrison, 147 U. S. 36;
> *In re* Fassett, 142 U. S. 486;
> *In re* Cooper, 143 U. S. 495;
> U. S. v. Hoffman, 4 Wall., 71 U. S. 161;
> *In re* Huguley Mfg. Co., 184 U. S. 301;
> *Ex parte* Penn, 109 U. S. 175, 176;
> Bronson v. Lacrosse Ry. Co., 1 Wal. 408;
> Fitzherbert's Natura Brevium (46*a*.) side p. 108;
> Jones v. Owens, 18 Law J. 2 Q. B. 8;
> *Ex parte* Phœnix Ins. Co., 118 U. S. 610;
> *In re* Rice, 155 U. S. 396.

As the case attempted to be removed in this instance is one where the jurisdiction is sought to be founded only on the fact of the diverse citizenship of the parties, if the plaintiff should appear in the cause and thus waive his privilege (as this Court, by the cases above cited, has held he would), then by such appearance he would bring the case within the **general** jurisdiction of the

Court under the 1st clause of section one of the act, and the Court would acquire jurisdiction of it, and his right to object to the want of jurisdiction by virtue of the removal (notwithstanding he had before such waiver objected to the Court's jurisdiction on that ground), would be absolutely gone, both in such Court and on appeal or error; consequently, through the action of the Court in wrongfully exercising the excess jurisdiction, the petitioner, not having yet waived his privilege, **must** (if the remedy now sought be not awarded to him) either abandon his action altogether, or submit himself to the **general** jurisdiction of the Court, by continuing the prosecution of the case in that court, and thus lose his right to object that the cause was not lawfully removed, and that the Court was without jurisdiction over it by virtue of such removal, both in that Court or on appeal or error. Hence, unless the exercise of the excess of jurisdiction complained of is restrained by this Court, petitioner will be remediless as against the unlawful removal and be compelled, despite his objection, to submit to a trial of the cause in a court other than that in which he is required to try his case by the law and the decisions of this Court. Consequently the case falls within the rule laid down in the above and numerous other cases decided by this Court, plaintiff not having waived his privilege, and having made timely objection to the jurisdiction, that,

> "When it appears that the Court whose action is sought to be prohibited had clearly no jurisdiction of the cause originally, * * * a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right."

See cases next *supra*.

In *Ex parte* Phenix Ins. Co., 118 U. S. 625, 626, this Court says:

> "But in the present case the District Court is called upon by the petition of the owner of the vessel to first determine the question of any liability, when it has not jurisdiction of the cause of action, and then to determine whether the statute covers the case. **The case is clearly one for a writ of prohibition, as the want** of jurisdiction appears on the face of the proceedings." (Citing U. S. v. Peters, 3 Dal. 121.)
>
> *Ex parte* Penn., 109 U. S. 175, 176;
> Board v. Hammond El. Co., 198 U. S. 432.

c. The action of the Circuit Court complained of, is in direct violation of its duty as prescribed by the act in such a case, is in violation of the statute and of the authority of the United States by which it was created and from which it receives its authority.

In Minnesota v. Northern Securities Co., 194 U. S. 65 and 66, this Court says:

> "An allegation in a complaint filed in a circuit court of the United States **may**, indeed, **in a sense**, confer jurisdiction to determine whether the case is **of the class of which the Court may properly take cognizance for the PURPOSES of a final decree on the merits.** Newburyport Water Co. v. Newburyport, 193 U. S. 561, and Pacific Electric Ry. Co. v. Los Angeles, *post*, page 112, decided at present term. **But if, notwithstanding such an allegation, the Court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction, then, by the express command of the Act of 1875, its duty is to proceed no further.** That is manifest from the 5th section of that act, which provides: 'That if, in any suit commenced in a circuit court or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said

Circuit Court at any time after such suit has been brought or **removed thereto,** that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further, but shall dismiss said suit **or remand it to the court from which it was removed** as justice may require.' 18 Stat. 470. This provision has not been superseded by any subsequent legislation."

Neel v. Penn Co., 157 U. S. 153, 154;
Tennessee v. U. & P. Bk., 152 U. S. 461;
Colorado Co. v. Turk, 150 U. S. 138, 143;
Hanrick v. Hanrick, 153 U. S. 192, 198.

d. But even if your petitioner had a remedy by appeal or error, yet it must be an adequate remedy to bar it from a right to the writ of prohibition under the facts shown by the petition for removal and record in the suit involved in this proceeding.

In re Huguley, 184 U. S. 301;
In re Atlantic Ry. Co., 164 U. S. 633.

The remedy by appeal or error would be inadequate. The petitioner would be compelled to suffer the expense, delay and trouble of a complete trial in the Circuit Court to which the case has been removed, although every step in the proceedings and the final judgment would all be nullities, and then bear the expense, delay and trouble of an appeal to the Circuit Court of Appeals and to this court, and the only result would be to have the action of the Circuit Court reversed and the cause remanded to the State court, and the appeal would be no remedy for any such expense, delay or trouble, and the peti-

tioner would be then, with regard to enforcing his rights against the defendant, just where he is now. Besides, through the appeal or error the assumption and exercise of the excess of jurisdiction would not be prevented, though in violation of the duty of the court, the statute, and of the authority of the United States and of plaintiff's rights under the act, but only act upon the action of the court after it had been fully accomplished and completed, under circumstances where the court's action was not error or irregularity in the exercise of some jurisdiction, but simply judicial action founded upon no authority whatever. Appeal or error affording such results is not adequate, and in effect is a declaration that the courts may exercise all the excess of jurisdiction they choose, that they cannot be stopped, and all that can be done is to set aside what they do in the exercise of such jurisdiction after the exercise of it is at an end.

V.

The writ of mandamus is also a proper remedy for the assumption and exercise of excess of jurisdiction complained of in this proceeding, and more especially for causing the doing of that which it is the Court's duty to do under the circumstances by express command of the law and affording affirmative relief.

In Virginia v. Rives, 100 U. S. 323, this Court say:

> "Sect. 688 of the Revised Statutes enacts that the Supreme Court shall have power to issue * * * writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State or an ambassador, or other public minister, or a consul or vice-consul,

is a party. In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, **and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.** It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy **when the case is outside of the exercise of this discretion, and outside the JURISDICTION of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds.** Bacon's Abridgment, Mandamus, Letter D; Tapping on Mandamus, 105; 3 Bl. Com. 100. This subject was discussed at length in *ex parte* Bradley (7 Wall. 364), and what was there said renders unnecessary any discussion of it now."

In *ex parte* Bradley, 7 Wall. 377, this Court say:

"The ground of our decision upon this branch of the case is, that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. The contrary must be maintained before this order can be upheld and the writ of mandamus denied. No amount of judicial discretion of a Court **can supply a defect or want of jurisdiction** in the case. **The subject matter is not before it; the proceeding is** *coram non judice* **and void,**" and the writ in this case was granted.

Virginia v. Paul, 148 U. S. 123;
Gaines v. Rugg, 148 U. S. 243.
In re Delgado, 140 U. S. 590;
In re Hohorst, 150 U. S. 663, 664;
Ex parte Bradley, 7 Wal. 364.

The remedy must be an adequate remedy.

In re Atlantic City R. R., 164 U. S. 633;
Gaines v. Rugg, 148 U. S. 243, and cases cited;

In re Penn. Co., 137 U. S. 452–3.
In re Grossmayer, Pet., 177 U. S. 49;
In re Hohorst, 150 U. S. 663–4;
In re Huguley Mfg. Co., 184 U. S. 301;
Ky. v. Powers, Sup. Ct. Reptr., Vol. 26, No. II, 387.

If there is any appeal or error in such a case then it is an inadequate remedy for the same reasons above assigned why appeal or error would not in such a case as is involved in this application be an adequate remedy such as ought to prevent prohibition issuing.

If, therefore, there is any remedy by appeal or writ of error, then, as we have shown above in discussing the subject of prohibition, it is a wholly inadequate remedy.

H. S. Mecartney,
James C. Jones,
J. J. Darlington,
C. G. B. Drummond,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

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Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING No. 9 Orig'l.
C. T. 190

Brief in Support of Return to Petition for Writ of Mandamus.

JOHN M. MOORE,
EDWARD C. ELIOT,
GEORGE H. WILLIAMS,
Counsel.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 23.

The answer of Gustavus A. Finkelnburg, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to the rule upon him to show cause why a writ of mandamus should not issue commanding him in said Court to remand to the Circuit Court of the City of St. Louis and State of Missouri the suit of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant.

The respondent respectfully answers and certifies to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

First: That the petitioner in said petition has cor-

rectly set out the matters appearing of record in the proceedings in the aforesaid suit of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant.

Second: Respondent overruled the motion to remand the aforesaid case of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant; for the reason that in the opinion of the respondent the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri had jurisdiction of the aforesaid case of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant, and for the reasons briefly indicated in the memorandum of decision filed in the cause.

Third: Respondent is advised that it is not necessary that he should make any further or other answer to the rule aforesaid, than is hereinabove contained, nor more specifically to any of the allegations set forth in the petition for mandamus aforesaid, and having fully answered said rule respondent prays to be hence dismissed with all proper costs.

Respondent also respectfully refers to brief of counsel filed in this Honorable Court, and the authorities referred to in support and maintenance of the ruling made by respondent.

Respondent respectfully submits to the judgment of this Honorable Court, and will enforce by order any direction given by the Court in the premises.

... .

Judge of the District Court of the United States for the Eastern District of Missouri.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 23.

Brief in Support of Return to Petition for Writ of Mandamus.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Abram C. Wisner, a citizen and resident of Michigan, brings a civil suit in the Circuit Court of the City of St. Louis, State of Missouri, against John D. Beardsley, a citizen and resident of the State of Louisiana. The matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000.

The only question now presented to this Honorable Court for decision is, whether or not such a suit is properly removable by the defendant to the Circuit

Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

The question depends upon the constructon of Sections 1 and 2 of the Act of March 3d, 1875, as amended by the Act of March 3d, 1887, as corrected by the Act of August 13th, 1888. The material portions of those sections are as follows:

> "Section 1. That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different States, * * * . But * * * no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."
>
> "Sec. 2. * * * Any other suit of a civil nature, at law, or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein, being non-residents of that State."

Of what suits of a civil nature are the Circuit Courts of the United States "given jurisdiction by the preceding section?" The first clause of the "preceding section" gives the Circuit Courts of the United States

jurisdiction of all suits of a civil nature, involving the jurisdictional amount in value, in which there "shall be a controversy between citizens of different States." A subsequent clause of the "preceding section" provides that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant. Is the jurisdiction of the Circuit Courts of the United States conferred by the first clause of Section 1, and does the subsequent clause of said section merely limit the venue of suits, i. e., confer a special privilege on a defendant; or does the subsequent clause of Section 1 actually limit and confine the jurisdiction of the Circuit Courts? In other words, does Section 1 confer jurisdiction in such cases generally on all Circuit Courts of the United States, with a special privilege in the defendant in each particular case to be sued in either the district of his own or the plaintiff's residence, a privilege which he may claim or waive; or does Section 1, in cases where the litigants are citizens of different States, confer jurisdiction only on two Circuit Courts, viz., the Circuit Court of the District of the plaintiff's residence, and the Circuit Court of the District of the defendant's residence? If the first alternative be correct, and the jurisdiction is conferred generally on all Circuit Courts of the United States, then Section 2, by its very terms, confers the same jurisdiction upon said Circuit Courts on removal of suits from State Courts.

We respectfully submit that the latter has been the construction given to Section 1 of said Act by this Hon-

orable Court in several cases, notably the cases of McCormick Machine Company vs. Walthers, 134 U. S. 41, and Davidson vs. Railway Company, 157 U. S. 201.

In the McCormick case, after quoting the last portion of Section 1 of the Act of March 3d, 1887, the Chief Justice said:

> "The jurisdiction common to all the Circuit Courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts, is described in section 1, while the foregoing clause (the venue clause), relates to the district in which suit may originally be brought."

In the Davidson case, *supra*, the Court said:

> "Sec. 2, however, refers to the first part of section 1, by which the jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

It has been frequently held by this Court that the clause of Section 1, providing that suit shall only be brought in the district of either the residence of the plaintiff or the defendant, is a special and personal privilege, enuring to the benefit of the defendant, a privilege which may be waived.

This principle was very clearly stated by Chief Justice Waite in the case of Ex Parte Schollenberger, 96 U. S. 369, in the following language:

> "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive."

property of the defendant. It was held that the defendant was entitled, under the Act of March 3d, 1887, Section 2, as amended by the Act of August 13th, 1888, to remove the cause into the Circuit Court of the United States, although neither plaintiff nor the defendant was a resident of Massachusetts. Justice Field, in an opinion, in which the entire Court concurred, used the following language:

> "A suit of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs, and in which the controversy is between citizens of different States, is a suit of which the Circuit Courts of the United States are given original jurisdiction. There is a restriction with regard to the particular Circuit Court in which such suits must be brought, but it relates to the parties and is of such a nature that a defendant can waive it if he chooses."

The principle supporting the right of removal is very clearly stated in the opinion in Vinal vs. Continental Construction and Implement Company, 34 Fed. 299:

> "It would seem to be the reasonable meaning of the second section of the amendatory Act (the Act of '87 as amending the Act of '75), like the second section of the original Act, to permit the defendant to litigate in the Circuit Court by a removal, a suit which he could litigate there *if it was originally commenced* in a Circuit Court."

Again in that case the Court say:

> "The second section of the amendatory Act restricts the right of removal so as to confine its exercise to a defendant who is a non-resident of

the State in which he is sued in a State Court, and makes no other change in the second section of the original Act. Ambiguity has been introduced into the second section of the amendatory Act by limiting the amendatory Act to 'suits of which Circuit Courts are given jurisdiction in the preceding section.' It has been thought by some that this phrase restricts the right of removal to suits in which the particular Circuit Court to which the defendant seeks to resort has not only jurisdiction of the subject matter, but also jurisdiction over the person of the defendant. This is not a necessary, and does not seem to be a sensible, construction of the section. *That phrase was apparently used to dispense with the recapitulation of the several conditions which determine the jurisdiction of the subject matter in the first section.* The word 'jurisdiction' refers to jurisdiction over the subject matter, to the general jurisdiction of circuit courts, *and means a jurisdiction which would enable any Circuit Court to entertain and determine the controversy if the parties were before it.*"

We respectfully submit that the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri properly overruled the motion to remand in the case of Wisner vs. Beardsley, as set forth in the present petition for a writ of mandamus, and we respectfully pray the judgment of this Honorable Court.

JOHN M. MOORE,
EDWARD C. ELIOT,
GEORGE H. WILLIAMS,
Counsel.

This language was adopted in the case of St. Louis, etc., Railway vs. McBride, 141 U. S. 131.

In the case of Central Trust Company vs. McGeorge, 151 U. S. 131, the Court said:

> "The exemption from being sued out of the district of defendant's domicile is a personal privilege which may be waived, and which is waived by pleading to the merits."

Section 2 of the Act of March 3d, 1887, in no wise provides for any election by any party in respect to removal of suits from State Courts. There can be no dispute in reference to the construction of Section 2. It provides in broad terms for removal of every suit of a civil nature "of which the Circuit Courts of the United States are given jurisdiction by the preceding section." If the position as above stated as to the general jurisdiction conferred by Section 1 upon the Circuit Courts of the United States be correct, then the suit brought by Mr. Wisner in the Circuit Court of the City of St Louis, State of Missouri, was properly removed by the defendant to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

The counsel for the petitioner in this proceeding, if we understand them correctly, contend that, where a suit is pending in a State Court between two non-residents, such suit cannot be removed to the Circuit Court of the United States without the consent of both parties, and that the plaintiff, Wisner, has never given his consent to be sued in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Assuming for the moment that the "personal privilege" contained in Section 1 ap-

plies to a case removed to a United States Circuit Court by virtue of Section 2, the contention of petitioner's counsel would remain unsupported. The personal privilege granted by Section 1 is granted to defendants, and not to plaintiffs. Nowhere in Section 1 is any privilege granted to any plaintiff, which could be construed to apply to a suit removed under Section 2.

As stated by Judge Simonton, in V. C. Chemical Company vs. Insurance Companies (C. C.), 108 Fed. 452:

> "The right of removal is given wholly to the defendant, without any reference in a remote degree to the plaintiff or his wishes, so no waiver on the part of the plaintiff is necessary or proper."

Furthermore, the plaintiff has himself elected in which district to bring his suit. Section 1 provides that "the Circuit Courts of the United States shall have original cognzance, *concurrent* with the Courts of the several States," of suits between citizens of different States, involving the jurisdictional amount. With this provision before him, Mr. Wisner deliberately selected the Circuit Court of the City of St. Louis, State of Missouri, in which to bring his suit, and he thereby, *ipso facto*, necessarily consented to the *concurrent* jurisdiction of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Where a plaintiff consents to the jurisdiction of a State Court, he thereby consents to all concurrent jurisdiction of Federal Courts, provided by Federal Statute.

The question in this precise form has never been presented to this Honorable Court for decision, although other provisions of Sections 1 and 2 of the Act of March 3d, 1875, as amended, have been frequently construed. In the recent case of Cochran vs. Montgomery County, 199 U. S. 260, this Court reviewed the provisions in respect to the right to remove on account of local prejudice. On page 273 in the opinion of this Court, the following language is found:

> "The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs, and only according it to defendants when sued in plaintiff's district."

This language must be construed with reference to the precise point before the Court, removal on account of local prejudice. In such cases the language of Section 2 expressly limits the right to remove to suits brought in the district of plaintiff's residence. The right to remove on acount of local prejudice is accorded by Section 2 only "where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." No such limitation is found in the other provisions of Section 2.

While the question at issue has never been directly decided by this Honorable Court, it has frequently been passed upon by the Circuit Courts of the United States. These latter decisions are in conflict, and it

would serve no purpose to review them at length. The most recent case denying jurisdiction of the United States Circuit Courts, upon removal, where both parties are non-residents, is found in Foulk vs. Gray, 120 Fed. 156. In the opinion in that case Judge Kellar admits that the weight of the Federal authority is against his conclusion, but bases his decision against the right to remove upon the ground that there must be mutual consent in such a case to give the United States Circuit Court jurisdiction. We have attempted, *supra*, to show the fallacy of that position.

The two most recent Federal cases upholding the right of removal in cases where both parties are non-residents, are Rome Petroleum Company vs. Hughes, 130 Fed. 585, and Morris vs. Clark Construction Co., 140 Fed. 756, the decision in the latter case being published after the decision by Judge Finkelnberg in the present case.

This question is said by Mr. Dillon in his work on Removal of Causes, to be well settled in favor of the right of removal in a case like the present, and Judge Dillon's view is admitted by Judge Kellar in Foulk vs. Gray, *supra*, to be correct, treated as a statement derivable from the number of cases which have upheld that view, as compared with the number holding the opposite.

The only State Court decision on the question which has been brought to our attention, is the case of American Finance Company vs. Boswick, 151 Mass. 19. In that case a citizen of Pennsylvania brought an action against a citizen of New York in the State Court of Massachusetts, and sued out an attachment upon the

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IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

0 Orig'l.

.T. 1906 ORIGINAL PROCEEDING NO. 10

Brief in Support of Return to Petition for Writ of Prohibition.

JOHN M. MOORE,
EDWARD C. ELIOT,
GEORGE H. WILLIAMS,
Counsel.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 24.

The answer of Gustavus A. Filkenburg, Judge of the District Court of the United States for the Eastern District of Missouri to the rule upon him to show cause why a writ of prohibition should not issue against him in said Court from asserting and exercising jurisdiction over the suit of Abram C. Wisner vs. John D. Beardsley, which was removed from the Circuit Court of the City of St. Louis to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, or from retaining said suit in said United States Circuit Court by virtue of said removal, or from taking any steps in the said suit so removed except to remand the same.

Respondent now respectfully answers and certifies to the Honorable Supreme Court of the United States:

First: That the petitioner has correctly set out the

matters appearing of record in the proceedings in the said suit of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant.

Second: That respondent overruled the motion to remand the aforesaid case of Abram C. Wisner, plaintiff, vs John D. Beardsley, defendant, for the reason that in the opinion of the respondent the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri had jurisdiction of the aforesaid case of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant, and for the reasons brefly indicated in the memorandum of decision filed in the cause.

Third: Respondent is advised that it is not necessary that he should make any further or other answer to the rule aforesaid than is hereinabove contained, and respondent respectfully submits to the judgment of the Court in the premises, and will enforce by order any direction which may be given.

Respondent also respectfully refers to the brief of counsel filed in this Honorable Court, and the authorities referred to in support and maintenance of the ruling made by respondent.

. . . . . .

Judge of the District Court of the United States for the Eastern District of Missouri.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 24.

Brief in Support of Return to Petition for Writ of Prohibition.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Abram C. Wisner, a citizen and resident of Michigan, brings a civil suit in the Circuit Court of the City of St. Louis, State of Missouri, against John D. Beardsley, a citizen and resident of the State of Louisiana. The matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000.

The only question now presented to this Honorable Court for decision is, whether or not such a suit is properly removable by the defendant to the Circuit

Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

The question depends upon the constructon of Sections 1 and 2 of the Act of March 3d, 1875, as amended by the Act of March 3d, 1887, as corrected by the Act of August 13th, 1888. The material portions of those sections are as follows:

> "Section 1. That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different States, * * * . But * * * no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."
>
> "Sec. 2. * * * Any other suit of a civil nature, at law, or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein, being non-residents of that State."

Of what suits of a civil nature are the Circuit Courts of the United States "given jurisdiction by the preceding section?" The first clause of the "preceding section" gives the Circuit Courts of the United States

jurisdiction of all suits of a civil nature, involving the jurisdictional amount in value, in which there "shall be a controversy between citizens of different States." A subsequent clause of the "preceding section" provides that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant. Is the jurisdiction of the Circuit Courts of the United States conferred by the first clause of Section 1, and does the subsequent clause of said section merely limit the venue of suits, i. e., confer a special privilege on a defendant; or does the subsequent clause of Section 1 actually limit and confine the jurisdiction of the Circuit Courts? In other words, does Section 1 confer jurisdiction in such cases generally on all Circuit Courts of the United States, with a special privilege in the defendant in each particular case to be sued in either the district of his own or the plaintiff's residence, a privilege which he may claim or waive; or does Section 1, in cases where the litigants are citizens of different States, confer jurisdiction only on two Circuit Courts, viz., the Circuit Court of the District of the plaintiff's residence, and the Circuit Court of the District of the defendant's residence? If the first alternative be correct, and the jurisdiction is conferred generally on all Circuit Courts of the United States, then Section 2, by its very terms, confers the same jurisdiction upon said Circuit Courts on removal of suits from State Courts.

We respectfully submit that the latter has been the construction given to Section 1 of said Act by this Hon-

orable Court in several cases, notably the cases of McCormick Machine Company vs. Walthers, 134 U. S. 41, and Davidson vs. Railway Company, 157 U. S. 201.

In the McCormick case, after quoting the last portion of Section 1 of the Act of March 3d, 1887, the Chief Justice said:

> "The jurisdiction common to all the Circuit Courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts, is described in section 1, while the foregoing clause (the venue clause), relates to the district in which suit may originally be brought."

In the Davidson case, *supra*, the Court said:

> "Sec. 2, however, refers to the first part of section 1, by which the jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

It has been frequently held by this Court that the clause of Section 1, providing that suit shall only be brought in the district of either the residence of the plaintiff or the defendant, is a special and personal privilege, enuring to the benefit of the defendant, a privilege which may be waived.

This principle was very clearly stated by Chief Justice Waite in the case of Ex Parte Schollenberger, 96 U S. 369, in the following language:

> "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive."

This language was adopted in the case of St. Louis, etc., Railway vs. McBride, 141 U. S. 131.

In the case of Central Trust Company vs. McGeorge, 151 U. S. 131, the Court said:

> "The exemption from being sued out of the district of defendant's domicile is a personal privilege which may be waived, and which is waived by pleading to the merits."

Section 2 of the Act of March 3d, 1887, in no wise provides for any election by any party in respect to removal of suits from State Courts. There can be no dispute in reference to the construction of Section 2. It provides in broad terms for removal of every suit of a civil nature "of which the Circuit Courts of the United States are given jurisdiction by the preceding section." If the position as above stated as to the general jurisdiction conferred by Section 1 upon the Circuit Courts of the United States be correct, then the suit brought by Mr. Wisner in the Circuit Court of the City of St. Louis, State of Missouri, was properly removed by the defendant to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

The counsel for the petitioner in this proceeding, if we understand them correctly, contend that, where a suit is pending in a State Court between two non-residents, such suit cannot be removed to the Circuit Court of the United States without the consent of both parties, and that the plaintiff, Wisner, has never given his consent to be sued in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Assuming for the moment that the "personal privilege" contained in Section 1 ap-

plies to a case removed to a United States Circuit Court by virtue of Section 2, the contention of petitioner's counsel would remain unsupported. The personal privilege granted by Section 1 is granted to defendants, and not to plaintiffs. Nowhere in Section 1 is any privilege granted to any plaintiff, which could be construed to apply to a suit removed under Section 2.

As stated by Judge Simonton, in V. C. Chemical Company vs. Insurance Companies (C. C.), 108 Fed. 452:

> "The right of removal is given wholly to the defendant, without any reference in a remote degree to the plaintiff or his wishes, so no waiver on the part of the plaintiff is necessary or proper."

Furthermore, the plaintiff has himself elected in which district to bring his suit. Section 1 provides that "the Circuit Courts of the United States shall have original cognzance, *concurrent* with the Courts of the several States," of suits between citizens of different States, involving the jurisdictional amount. With this provision before him, Mr. Wisner deliberately selected the Circuit Court of the City of St. Louis, State of Missouri, in which to bring his suit, and he thereby, *ipso facto*, necessarily consented to the *concurrent* jurisdiction of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Where a plaintiff consents to the jurisdiction of a State Court, he thereby consents to all concurrent jurisdiction of Federal Courts, provided by Federal Statute.

The question in this precise form has never been presented to this Honorable Court for decision, although other provisions of Sections 1 and 2 of the Act of March 3d, 1875, as amended, have been frequently construed. In the recent case of Cochran vs. Montgomery County, 199 U. S. 260, this Court reviewed the provisions in respect to the right to remove on account of local prejudice. On page 273 in the opinion of this Court, the following language is found:

> "The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs, and only according it to defendants when sued in plaintiff's district."

This language must be construed with reference to the precise point before the Court, removal on account of local prejudice. In such cases the language of Section 2 expressly limits the right to remove to suits brought in the district of plaintiff's residence. The right to remove on acount of local prejudice is accorded by Section 2 only "where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." No such limitation is found in the other provisions of Section 2.

While the question at issue has never been directly decided by this Honorable Court, it has frequently been passed upon by the Circuit Courts of the United States. These latter decisions are in conflict, and it

would serve no purpose to review them at length. The most recent case denying jurisdiction of the United States Circuit Courts, upon removal, where both parties are non-residents, is found in Foulk vs. Gray, 120 Fed. 156. In the opinion in that case Judge Kellar admits that the weight of the Federal authority is against his conclusion, but bases his decision against the right to remove upon the ground that there must be mutual consent in such a case to give the United States Circuit Court jurisdiction. We have attempted, *supra*, to show the fallacy of that position.

The two most recent Federal cases upholding the right of removal in cases where both parties are non-residents, are Rome Petroleum Company vs. Hughes, 130 Fed. 585, and Morris vs. Clark Construction Co., 140 Fed. 756, the decision in the latter case being published after the decision by Judge Finkelnberg in the present case.

This question is said by Mr. Dillon in his work on Removal of Causes, to be well settled in favor of the right of removal in a case like the present, and Judge Dillon's view is admitted by Judge Kellar in Foulk vs. Gray, *supra*, to be correct, treated as a statement derivable from the number of cases which have upheld that view, as compared with the number holding the opposite.

The only State Court decision on the question which has been brought to our attention, is the case of American Finance Company vs. Boswick, 151 Mass. 19. In that case a citizen of Pennsylvania brought an action against a citizen of New York in the State Court of Massachusetts, and sued out an attachment upon the

property of the defendant. It was held that the defendant was entitled, under the Act of March 3d, 1887, Section 2, as amended by the Act of August 13th, 1888, to remove the cause into the Circuit Court of the United States, although neither plaintiff nor the defendant was a resident of Massachusetts. Justice Field, in an opinion, in which the entire Court concurred, used the followng language:

> "A suit of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs, and in which the controversy is between citizens of different States, is a suit of which the Circuit Courts of the United States are given original jurisdiction. There is a restriction with regard to the particular Circuit Court in which such suits must be brought, but it relates to the parties and is of such a nature that a defendant can waive it if he chooses."

The principle supporting the right of removal is very clearly stated in the opinion in Vinal vs. Continental Construction and Implement Company, 34 Fed. 229:

> "It would seem to be the reasonable meaning of the second section of the amendatory Act (the Act of '87 as amending the Act of '75), like the second section of the original Act, to permit the defendant to litigate in the Circuit Court by a removal, a suit which he could litigate there *if it was originally commenced* in a Circuit Court."

Again in that case the Court say:

> "The second section of the amendatory Act restricts the right of removal so as to confine its exercise to a defendant who is a non-resident of

the State in which he is sued in a State Court, and makes no other change in the second section of the original Act. Ambiguity has been introduced into the second section of the amendatory Act by limiting the amendatory Act to 'suits of which Circuit Courts are given jurisdiction in the preceding section.' It has been thought by some that this phrase restricts the right of removal to suits in which the particular Circuit Court to which the defendant seeks to resort has not only jurisdiction of the subject matter, but also jurisdiction over the person of the defendant. This is not a necessary, and does not seem to be a sensible, construction of the section. *That phrase was apparently used to dispense with the recapitulation of the several conditions which determine the jurisdiction of the subject matter in the first section.* The word 'jurisdiction' refers to jurisdiction over the subject matter, to the general jurisdiction of circuit courts, *and means a jurisdiction which would enable any Circuit Court to entertain and determine the controversy if the parties were before it.*"

We respectfully submit that the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri properly overruled the motion to remand in the case of Wisner vs. Beardsley, as set forth in the present petition for a writ of prohibition, and we respectfully pray the judgment of this Honorable Court.

JOHN M. MOORE,
EDWARD C. ELIOT,
GEORGE H. WILLIAMS,
Counsel.

Supreme Court of the United States.

Nos. 9 and 10, Original.—October Term, 1906.

Ex parte Abram C. Wisner. } Petitions for Writs of Mandamus and of Prohibition.

[December 10, 1906.]

Abram C. Wisner, a citizen of the State of Michigan, commenced an action at law, on February 17, A. D. 1906, in the Circuit Court in and for the city of St. Louis and State of Missouri, against John D. Beardsley, a citizen of the State of Louisiana, by filing a petition, together with an affidavit, on which that court issued a writ of attachment, in the usual form, directed to the sheriff of St. Louis. The sheriff returned no property found, but that he had garnisheed the Mississippi Valley Trust Company, a corporation of Missouri, and also had served Beardsley with summons in the city of St. Louis.

Saturday, March 17, A. D. 1906, the garnishee answered, and on the same day Beardsley filed his petition to remove the action from the State court into the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, on the ground of diversity of citizenship, together with the bond required in such case. An order of removal was thereupon entered by the State court and the transcript of record was filed in the Circuit Court of the United States.

Monday, March 19, Wisner moved to remand in these words:

"Now at this day comes plaintiff, by his attorneys, Jones, Jones & Hocker, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the court to remand this cause to the Circuit Court of the city of St. Louis, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and the cause is not one within the original jurisdiction of this court, hence this court cannot acquire jurisdiction by removal."

The motion was heard and denied April 2, 1906, the Circuit Court referring to *Foulk* v. *Gray*, 120 Fed. 156, and *Rome Petroleum Company* v. *Hughes*, 130 Fed. 585, as representing the different views of the courts below on the question involved.

On April 23, Wisner applied to this court for leave to file a petition for mandamus as well as a petition for prohibition, leave was granted, and rules entered returnable May 14, 1906, and the cases submitted on the returns to the rules.

Mr. Chief Justice FULLER delivered the opinion of the Court:

By Article III of the Constitution the judicial power of the United States was "vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

And the judicial power was extended "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects."

The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it, *United States* v. *Hudson*, 7 Cranch, 32; but the jurisdiction of the Circuit Courts depends upon some act of Congress. *Turner* v. *Bank*, 4 Dall. 8, 10; *McIntire* v. *Wood*, 7 Cranch, 504, 506; *Sheldon* v. *Sill*, 8 How. 441, 448; *Stevenson* v. *Fain*, 195 U. S. 165, 167. In the latter case we said: "The use of the word 'controversies' as in contradistinction to the word 'cases,' and the omission of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."

The first section of the Act of March 1, 1887, 24 Stat. c. 373, p. 552, as corrected by the Act of August 13, 1888, 25 Stat. c. 366, p. 433, amended sections 1, 2 and 3 of the Act of Congress of March 3, 1875, (18 Stat. c. 137, p. 470), as follows:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum of value aforesaid; . . . But no person shall be arrested in one

district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; . . ."

"SEC. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants theren, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, . . .

"Whenever any cause shall be removed from any State court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

Section 3, as amended, provided for petition and bond for "the removal of such suit into the Circuit Court to be held in the district where such suit is pending, . . ."

As it is the nonresident defendant alone, who is authorized to remove, the Circuit Court for the proper district is evidently the Circuit Court of the district of the residence of the plaintiff.

And it is settled that no suit is removable under section 2 unless it be one that plaintiff could have brought originally in the Circuit Court. *Tennessee* v. *Bank*, 152 U. S. 454; *Mexican National Railroad* v. *Davidson*, 157 U. S. 208; *Cochran* v. *Montgomery County*, 199 U. S. 272.

In *Shaw* v. *Quincy Mining Company*, 145 U. S. 444, 446, Mr. Justice Gray, speaking for the court, in disposing of the question whether, under § 1, "a corporation incorporated in one State of the Union, and having a usual place of business in another State in which it has not been incorated, may be sued in a Circuit Court of the United States held in the latter State, by a citizen of a different State," said:

"This question, upon which there has been a diversity of opinion in the Circuit Courts, can be best determined by a review of the acts of Congress, and of the decisions of this court, regarding the original jurisdiction of the Circuit Courts of the United States over suits between citizens of different States.

"In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies 'between citizens of different States,' Congress, by the Judiciary Act of September 24, 1789, c. 20, § 11, conferred jurisdiction on the Circuit Court of suits of a civil nature, at common law or in equity, 'between a citizen of the State where the suit is brought and a citizen of another State,' and provided that 'no civil suit shall be brought against an inhabitant of the United States, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' 1 Stat. 78, 79."

And, after observations in relation to the use of the word "inhabitant" in that act, and referring to the Act of May 4, 1858, 11 Stat. c. 27, p. 272, § 1, and the Act of March 3, 1875, 18 Stat. 470, c. 137, § 1, Mr. Justice Gray thus continued:

"The act of 1887, both in its original form, and as corrected in 1888, reenacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But where the jurisdiction of either is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that where the jurisdiction is founded upon any of the clauses mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides. *McCormick Company* v. *Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Company*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467.

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of

the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen: and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

In short, the acts of 1887–8 restored the rule of 1789, as we stated in *Cochran* v. *Montgomery County, supra.*

In the present case neither of the parties was a citizen of the State of Missouri, in which State the suit was brought, and, therefore, it could not have been brought in the Circuit Court in the first instance.

Wisner did not, of choice, select the State court as the forum, since he could not have sued in the Circuit Court under the act, because neither he nor Beardsley was a citizen of Missouri. And the question of jurisdiction relates to the time of commencing the suit.

But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties. As we have heretofore remarked: "Jurisdiction as to the subject-matter may be limited in various ways as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on." *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25. In *Central Trust Company* v. *McGeorge*, 151 U. S. 129, it was assumed, however, that the requirement that no suit should be brought in any other district than that of the plaintiff or of the defendant might be waived, where neither resided therein, because in that case the nonresident plaintiff had sued in the Circuit Court and the nonresident defendant had answered on the merits, which showed the consent of both parties and not unnaturally led to the result announced, while in this case there was no such consent. As was stated by Mr. Justice Brewer, in *Kinney* v. *Columbia Savings & Loan Association*, 191 U. S. 78, 82: "A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the State to the Federal court." When, then, Beardsley filed his petition for removal,

he sought affirmative relief in another district than his own. But plaintiff, in resisting the application and moving to remand, denied the jurisdiction of the Circuit Court. In *St. Louis &c. Railway Co.* v. *McBride*, 141 U. S. 127, where the plaintiffs were citizens and residents of the Western District of Arkansas, and commenced their action in the Circuit Court of the United States for the district, and the defendant was a corporation and citizen of the State of Missouri, it was held that, as the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him, on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect.

Our conclusion is that the case should have been remanded, and as the Circuit Court had no jurisdiction to proceed, that mandamus is the proper remedy.

Mandamus awarded; *petition for prohibition dismissed.*

Mr. Justice BREWER concurred in the result.

True copy.

Test:

Clerk Supreme Court U. S.